Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

VICTOR MANUEL RENDEROS,

Petitioner,

v.

STEWART J. RYAN, Warden, California State Prison,
Calipatria, California,
and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003), is former California Penal Code section 803(g), the statute of limitations controlling the underlying criminal action under which petitioner was prosecuted, an unconstitutional Ex Post Facto law within the meaning of Article 1, section 10, clause 1 of the United States Constitution as applied to prosecutions based on allegations of child sexual abuse allegedly occurring on January 1, 1988, or later?

2. Was the California Court of Appeal's decision in *People v. Renderos* (2003) 114 Cal. App. 4th 961, holding that former section 803(g) is not an unconstitutional Ex Post Facto law as applied as applied to prosecutions based on allegations of child sexual abuse allegedly occurring on January 1, 1988, or later, a violation of clearly established federal law as set forth in *Stogner v. California, supra*?

3. Was the Ninth Circuit's decision in *Renderos v. Ryan* 469 F.3d 788 (9th Cir. 2006), holding that former section 803(g) is not an unconstitutional Ex Post Facto law as applied as applied to prosecutions based on allegations of child sexual abuse allegedly occurring on January 1, 1988, or later, contrary to *Stogner v. California, supra*?

4. Does the requirement that all elements of a crime be proven beyond a reasonable doubt, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, require that all elements of a criminal statute of limitations like former section 803(g) be proven beyond a reasonable doubt?

5. Is former section 803(g) unconstitutional as a violation of the right not to be convicted on proof less than a reasonable doubt, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the

United States Constitution, because it provides that the element of corroboration need only be proven by clear and convincing evidence?

6. Did the trial court violate petitioner's right not to be convicted on proof of less than a reasonable doubt, as guaranteed by the Fifth, Sixth and Fourteenth Amendment to the United States Constitution, by instructing the jury, that the element of corroboration under former section 803(g) need only be proven by clear and convincing evidence?

7. Was the California Court of Appeal's decision *in People v. Renderos*, holding that former section 803(g) need not be proven beyond a reasonable doubt, a violation of clearly established federal law?

8. Was the Ninth Circuit's decision in *Renderos v. Ryan* that criminal statutes of limitation need not be proven beyond a reasonable doubt, wrong?

LIST OF ALL PARTIES

Petitioner

VICTOR MANUEL RENDEROS

Respondents

ERNEST ROE, Warden, California State Prison - Los Angeles
PEOPLE OF THE STATE OF CALIFORNIA.

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Citations of the Official and Unofficial Reports of the Opinions and Orders Entered in the Case by Courts or Administrative Agencies.

The Ninth Circuit's opinion is published at *Renderos v. Ryan* (2006) 469 F.3d 788. The order denying rehearing and the district court's order were unpublished. The California Court of Appeal's opinion is published at *People v. Renderos* (2003) 114 Cal. App. 4th 961.

Basis for Jurisdiction in the Supreme Court

1. Date of entry of order sought to be reviewed: November 8, 2006 (memorandum opinion), January 19, 2007 (order denying petition for rehearing / rehearing *en banc.*

2. Date of any order respecting rehearing: January 19, 2007.

3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1254(1).

Constitutional Provisions and Statutes Involved

United States Constitution

Article I, section 9, clause 3. No Bill of Attainder or ex post facto Law shall be passed.

Fifth Amendment. No person shall be ... deprived of ... liberty ... without due process of law...

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

Federal Statutes

28 U.S.C. section 2254(d). An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...

State Statutes

California Penal Code section 288(a). Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

California Penal Code section 288.5. (a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the

commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.

California Penal Code section 289(j). Any person who participates in an act of sexual penetration with another person who is under 14 years of age and who is more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

Former California Penal Code section 800. Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense. [1]

Former California Penal Code section 803(g).[2] (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

(2) This subdivision applies only if both of the following occur:

(A) The limitation period specified in Section 800 or 801 has expired.

(B) The crime involved substantial sexual conduct, as described in

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[1] Section 800 has since been amended to lengthen the statute of limitations to 10 years. The amended version is not at issue in this case.

[2] The section has been renumbered as 803(f). The quoted portions applicable to petitioner have not changed, except to add a reference in (g)(2)(A) to California Penal Code section 801.1, a section that did not exist at the time of petitioner's trial.

subdivision (b) of Section 1203.066, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

(3) (A) This subdivision applies to a cause of action arising before, on, or after January 1, 1994, the effective date of this subdivision, and it shall revive any cause of action barred by Section 800 or 801 if any of the following occurred or occurs....

....(ii) The complaint or indictment is or was filed subsequent to January 1, 1997, and it is or was filed within the time period specified within this subdivision...

California Penal Code section 1203.066(b). "Substantial sexual conduct" means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254.

2. Statement of the Case

a. Pleadings

In a complaint filed April 25, 2001, the government charged petitioner with various child sex abuse offenses: 1 count of California Penal Code section 288.5 (continuous lewd conduct with a child under 14), based on acts allegedly occurring between May 1, 1992 and September 18, 1992; 2 counts of California Penal Code section 289(j) (sexual penetration of a child under 14) based on acts allegedly occurring between September 19, 1992 and September 18, 1994; and 23 counts of California Penal Code section 288(a) (lewd conduct with a child under 14) based on acts allegedly occurring between September 1, 1992 and July 31, 1994. While the original charging document had no provisions concerning the statute of limitation, a later information alleged "that the statute of limitations has been expired on July 31, 2000" but that the complaint was filed "within one year of the complaint to law enforcement", invoking the special statute of limitations set forth in former section 803(g).

b. Trial

i Complaining witness.

The complaining witness, Ryan C., testified that petitioner had molested him when Ryan was a child, as follows:

Ryan's mother Lisa started dating petitioner in May of 1992 when Ryan was "seven or eight" years old. Ryan, his brother Jordan, Lisa, and petitioner went to the Russian River when Ryan was about eight. On this trip, petitioner took Ryan and Jordan on a canoe ride. They landed the canoe on a sand bar. Petitioner took Ryan's hand and put

it on petitioner's semi-erect penis saying, "leave it there". [3] Ryan said he removed his hand after just a few seconds.

Ryan said that two months after the trip to the Russian River, Ryan was in his bedroom, petitioner came in, fondled Ryan, and had Ryan masturbate him. Ryan said that, after the second sexual episode, petitioner would repeat the same conduct whenever Ryan's mother was away working nights.

Ryan testified that petitioner once tried to get Ryan to give him oral sex, but Ryan bit petitioner. About the same time, petitioner stuck his finger into Ryan's rectum. On another occasion, said Ryan, petitioner touched Ryan's rectum while Ryan was masturbating petitioner, but did not put his finger inside. When Ryan was almost eleven years old, petitioner tried to insert his penis into Ryan's rectum.

Ryan said that the sex between himself and petitioner stopped when Ryan reached eleven.

In March of 2001, when Ryan was 17, he told his girlfriend that petitioner had molested him. The girlfriend told him to report the alleged abuse to the police. [4]

ii The recorded telephone calls

The standard police method for obtaining the necessary "corroborating" evidence required under former section 803(g) is to have the "child" (Ryan was 17) attempt to elicit incriminating admissions from the suspect in a recorded telephone call. This the

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[3] While one would think the brother, Jordan, would have been called as a corroborating witness, Jordan did not testify.

[4] The prosecution did not call the girlfriend as a witness, either.

police did, having Ryan make two such calls to petitioner on May 20, 2001.

In the first tape, Ryan mentioned the incident at Russian River. petitioner first replied that he didn't remember, and later said: "That was a long time ago, don't worry about it. And you were just playing around, you know? No big thing."

In the second tape, Ryan asked petitioner to "counsel" him because he "can't get hard" during sex with his girlfriend. The following exchange occurred:

Ryan: " ... you would always like make me put my hand on your penis and shit like that? I mean-that bothers me."

Pet: "Oh well, you know? You-You wanted to do that. You know, remember? You wanted to."

Ryan: "Man, I was eight years old though."

Pet: "No, no. shit no. You were about 12, Man. You were old, already. And you was - I didn't - I didn't meet you when you was eight. You was older than that."

Later Ryan complained:

"...it's just not normal for guys to grab each other's dicks."

Pet: "Yeah, I couldn't figure out why you wanted to do it."

Ryan: "I didn't really want to, but you got my hand, you know?"

Pet: "No, you're the one. You started out, remember, you wanted to experiment crazy things. You were - you were always doing crazy things."

Later in the call petitioner asked Ryan what his girlfriend looked like. Ryan replied:

> "... She looks good, but I mean like, why'd you like-I just don't get that, I mean like how you'd make me try to suck your dick and everything. I mean--it's like you were using -its like you were using me to get what you wanted."

Pet: "Oh, no, no, no, no, no. Huh-uh. No. No. You got me wrong. You want to experiment things. You want to fuck around with this. You want to do that. You want to do this. You wanted to do that. You're the one that always wanted it. Remember the way you are, man. The way you used to be."

Ryan: "I don't know how I motivated it though, because I was hella young, and that's just what's been bothering me."

Pet: "Well, you knew what you were doing, bro'."

Ryan later complained:

> "I mean if just-I just think it's not normal for like you know, an older man to grab a kid's hand and put it on his dick."

Pet: "Oh, forget about that shit, you want to-you want to do things like that when you were younger, you want to do this, you want to experiment different things."

Ryan: "But then remember, you would grab my dick, too. I mean--

Pet: "You forget abut those things. just forget about those things and-and like I tell you, concentrate on now. Don't--forget about then. Forget about that shit, Man. Concentrate on your girl, on your woman's pussy."

Later, Ryan said:

"But then why'd you grab me, dude?"

Pet: "Forget about things like that -You were grabbing me you know and I was, you know, we were just fuckin' around and just forget about that shit."

iii Petitioner's testimony.

Petitioner testified that he had dated Lisa for three or four years. He would go her house for dinner, and he and Lisa would have normal sexual relations after her sons went to bed. He occasionally heard the boys giggling at the door. Occasionally, petitioner came out of Lisa's bedroom to find Ryan outside, as if he had been waiting for petitioner. Ryan would say: "Hey, how do you like my mother's ... female parts?" or something similar. Then Ryan would grab petitioner's penis. Petitioner said he objected and told Ryan not to do that. But Ryan repeated this conduct about five times. Ryan was eleven or twelve at the time.

Petitioner denied all of Ryan's accusations of molestation. Petitioner said that during the recorded phone call, he thought that Ryan was referring to the five or so times when Ryan had waited for him outside Lisa's bedroom and grabbed his penis, and responded accordingly.

iv Jury instructions

Trial court instructed the jury that if it found petitioner guilty beyond a reasonable doubt of any of the sex counts, it would then have to decide whether the counts were timely under former section 803(g). To do so, the jury would have to decide whether there was "independent evidence" that clearly and convincingly corroborated Ryan's claims of molestation. The court defined "clear and convincing

evidence" as "evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof."

ARGUMENT

1. The Supreme Court should grant certiorari because of the exceptional importance of the issues in this case and to address a conflict in the circuits.

a. Enforcement of *Stogner v. California*.

This petition involves issues of substantial importance. The significance of this case goes far beyond petitioner's concerns or even the concerns of those subjected to the nearly open-ended liability allowed by former section 803(g). At stake is the authority of this Court to determine what the Constitution and laws of the United States mean. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (Cranch) (1890).

In 2003, this Court found that California's attempt, in former section 803(g), to revive expired statutes of limitation for certain crimes not only violated the Ex Post Facto Clause, but was "a kind of extreme variant that, given the legal consensus of unconstitutionality, has not likely been often enacted in our Nation's history." *Stogner v. California*, 123 S.Ct. at 2459-60, 156 L. Ed. 2d at 563-4. This Court said it, not petitioner. When it deals with California, it is dealing with extremists.

While that should have been "the end of the matter", (see *Cunningham v. California*, - U.S. —, 127 S. Ct. 856; 166 L. Ed. 2d 856 (2007), quoting *Blakely v. Washington*, 542 U.S. 296 at 313, 304-305, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the California have placed the narrowest gloss on *Stogner* possible, resisting its application to only a handful of individuals that, like Stogner, were accused of

crimes predating the "magic" cutoff of January 1, 1988. *Stogner* did not allow for such an exception, and California was not at liberty to do this.

No lower court is apparently willing to enforce this Court's decision – certainly not the California State courts, and not the federal courts, either. This court need only look at the denial of the petition for rehearing *en banc* at page a-109. Not one single Ninth Circuit judge was willing to even hear the petition. Petitioner suspects that it is because enforcement of *Stogner* would mean that a number of sex offenders would have to be released from the California prison system. Apparently, no lower federal judge is apparently willing to be to be the one who is so-called "responsible" for the release of these sex offenders.

Whatever the reason for *Stogner's* non-enforcement, if this Court does not enforce *Stogner*, it will become an orphan decision, of little lasting value. And of course, the significance of this goes beyond *Stogner*, as *Stogner* is just one of several major criminal procedure decisions of this Court that California's courts have resisted (see, e.g., *Cunningham v. California*, — U.S. —, 127 S. Ct. 856, 876, n. 16, 166 L. Ed. 2d 856 (2007), discussed at pages 24-25 of this petition, in which this Court explicitly recognized that, instead of following this Court's prior decisions, California's courts had tried to make this Court's decisions follow California law.)

b. Whether a criminal statute of limitations is an element of an offense that must be proven beyond a reasonable doubt

There is a secondary issue of exceptional importance in this appeal – the standard of proof the Constitution requires for criminal statutes of limitation. Petitioner contends that because the statute of limitations is an element of the offenses for which he was charged, and a necessity to impose punishment, the Fifth Amendment, as applied to the States

through the Fourteenth Amendment's due process clause, required that all elements of formersection 803(g) be proven beyond a reasonable doubt. Former section 803(g), however, specifically provides that its elements need only be proven by clear and convincing evidence.

This Court has held, at least in the context of the federal conspiracy statute of limitations, 18 U.S.C. section 3282, that the issue of whether the charges have been brought within the statute of limitations is an element of an offense that must be proven beyond a reasonable doubt, *Grunewald v. United States*, 353 U.S. 391, 396, 77 S.Ct. 963, 969-970, 1 L.Ed.2d 931 (1957).

There is presently a split in the circuits on this issue. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held *Grunewald* required that section 3282 is subject to the requirement of proof beyond a reasonable doubt:

1st Circuit: *United States v. Juodakis*, 834 F.2d 1099, 1105 (1st Cir. 1987); *United States v. Walsh*, 928 F.2d 7, 11-12 (1st Cir. 1991);

2nd Circuit: *United States v. Rogers*, 9 F.3d 1025, 1029 (2nd Cir. 1993); *Jhirad v. Ferrandina*, 536 F.2d 478, 84-85 (2nd Cir.), *cert. denied*, 429 U.S. 833, 97 S. Ct. 97, 50 L. Ed. 2d 98 (1976);

3rd Circuit: *United States v. Oliva*, 46 F.3d 320, 324-25 (3rd Cir. 1995); *United States v. MacEwan*, 445 F.3d 237 (3rd Cir. 2006);

4th Circuit: *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 324 (4th Cir. 1983);

5th Circuit: *United States v. York*, 888 F.2d 1050, 1057 n.10 (5th Cir. 1989);

6th Circuit: *United States v. Brown*, 332 F.3d 363, 373 (6th Cir. 2003);

7th Circuit: *United States v. Sax*, 39 F.3d 1380, 1387-88 (7th Cir. 1994);

8th Circuit: *United States v. Little Dog*, 398 F.3d 1032, 1036 (8th Cir. 2005);

10th Circuit: *United States v. Hauck*, 980 F.2d 611, 613-14 (10th Cir. 1992).

The Ninth Circuit had also held similarly concerning section 3282. *United States v. Fuchs*, 218 F.3d 957, 967 (9th Cir. 2000) (rule stated in dissenting opinion but not disputed by the majority.) *United States v. Brown*, 936 F.2d 1042, 1049 (9th Cir. 1991); *United States v. Thomas*, 893 F.2d 1066, 1071 (9th Cir. 1990); *United States v. Andreen*, 628 F.2d 1236, 1240, 1248 (9th Cir. 1980); *Az Din v. United States*, 232 F.2d 283, 287 (9th Cir. 1956); *Buhler v. United States*, 33 F.2d 382 (9th Cir. 1929).

However, in the opinion below, *Renderos v. Ryan* (2006) 469 F.3d 788. the Ninth Circuit ignored *Grunewald* and the other section 3282 cases and relied on *United States v. Gonsalves*, 675 F.2d 1050, 1054 (9th Cir. 1982), a case that applied a preponderance standard to proof of a ***tolling provision*** of a criminal statute of limitations (not the statute of limitations itself.)

2. Former California Penal Code section 803(g) has the effect of reviving or resurrecting time barred prosecutions, and hence violates the Ex Post Facto Clause, Article 1, section 10, clause 1 of the U.S. Constitution.

a. *Stogner's* holding

In 1993, California enacted a new criminal statute of limitations, former California Penal Code section 803(g), permitting prosecution for sex-related child abuse where the prior limitations period has expired if, inter alia, the prosecution is begun within one year of a victim's report to police. A later provision made clear that this law revived causes of action barred by prior limitations statutes. [5]

In 1998, Marion Stogner was indicted for sex-related child abuse allegedly committed between 1955 and 1973. At the time those crimes were allegedly committed, the limitations period was three years. Stogner moved to dismiss the complaint on the ground that the Ex Post Facto Clause forbids revival of a previously time-barred prosecution. The trial court agreed with Stogner, but the California Court of Appeal reversed, relying on a recent decision of the California Supreme Court, *People v. Frazer,* 21 Cal. 4th 737, 982 P.2d 180 (1999), cert denied, 529 US 1108, 146 L Ed 2d 792, 120 S Ct 1960 (2000). *Frazer* had held that the Ex Post Facto Clause, Article I, section 9, clause 3 of the United States Constitution, simply did not apply to revival of expired statutes of limitation.

This Court disagreed with *Frazer* and reversed. The Court held

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[5] "A related provision, added to the statute in 1996, makes clear that a prosecution satisfying these three conditions "shall revive any cause of action barred by [prior statutes of limitations]." 1996 Cal. Stats. ch. 130, § 1 (codified at Cal. Penal Code Ann. § 803(g)(3)(A) (West Supp. 2003))" *Stogner v. California*, 539 U.S. at 609, 123 S. Ct. at 2449, 156 L. Ed. 2d at 550.

that, under established law, revival of an expired statute of limitations would violate the Ex Post Facto Clause, and that former section 803(g) had this effect.

In the opening paragraph of *Stogner v. California*, this Court describes former section 803(g) as follows:

> "California has brought a criminal prosecution after expiration of the time periods set forth in previously applicable statutes of limitations. California has done so under the authority of a new law that (1) permits resurrection of otherwise time-barred criminal prosecutions, and (2) was itself enacted after pre-existing limitations periods had expired."

Stogner v. California, 539 U.S. at 609, 123 S. Ct. at 2448, 156 L. Ed. 2d at 550.

This Court was clear that (1) and (2) were not synonymous. Following the opening paragraph, the Court immediately restated its dual-issue theme:

> "Section 803(g) authorized criminal prosecutions that the passage of time had previously barred. Moreover, it was enacted after prior limitations periods for Stogner's alleged offenses had expired."

Stogner v. California, 539 U.S. at 610, 123 S. Ct. at 2449, 156 L. Ed. 2d at 551. This Court's language could not be clearer:

> In ***all*** cases, former section 803(g) authorizes criminal prosecutions that the passage of time had previously barred.
>
> In ***Stogner's*** case, former section 803(g) was enacted after the three year statute of limitations applicable to Stogner had

expired.

The Court then discussed the two issues (1) and (2) in greater detail, continuing to distinguish them:

Discussing (2) [6], that section 803(g) was enacted after Stogner's statute of limitations had expired, the Court remarks:

> "First ... the [Ex Post Facto] Clause protects liberty by preventing governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects. *Calder v. Bull*, 3 Dall. 386, 391, 1 L. Ed. 648 (1798). Judge Learned Hand later wrote that extending a limitations period after the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.' *Falter v. United States*, 23 F.2d 420, 426 (CA2) *cert denied*, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928)....allowing legislatures to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation," and erosion of the separation of powers."

Stogner v. California, 539 U.S. at 611, 123 S. Ct. at 2450, 156 L. Ed. 2d at 551.

Discussing (1), that former section 803(g) authorizes or resurrects criminal prosecutions that the passage of time had previously barred, this Court held:

> "Second, the kind of statute at issue falls literally within the categorical descriptions of ex post facto laws set forth by Justice Chase more than 200 years ago in *Calder v. Bull, supra*

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[6] This Court discussed the two issues in reverse sequence.

--a categorization that this Court has recognized as providing an authoritative account of the scope of the Ex Post Facto Clause... Chase divided *ex post facto* laws into categories that he described in two alternative ways. See 529 U.S., at 522-524, and n 9, 529 U.S. 513, 146 L Ed 2d 577, 120 S Ct 1620.... In his alternative description, Chase traced these four categories back to Parliament's earlier abusive acts, as follows:

> Category 1: 'Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed.'
>
> Category 2: *'[A]t other times they inflicted punishments, where the party was not, by law, liable to any punishment.'*
>
> Category 3: '[I]n other cases, they inflicted greater punishment, than the law annexed to the offence.'
>
> Category 4: *'[A]t other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit.' 3 Dall., at 389, 1 L Ed 648* (emphasis altered from original).

The second category--including any 'law that aggravates a crime, or makes it greater than it was, when committed,' *id.*, at 390, 1 L Ed 648 --describes California's statute as long as those words are understood as Justice Chase understood them – i.e., as referring to a statute that 'inflict[s] punishments, where the party was not, by law, liable to any punishment,' id., at 389, 1 L Ed 648....

Stogner v. California, 539 U.S. at 611-612, 123 S. Ct. at 2450, 156 L. Ed. 2d at 552, emphasis in original.

Expanding on its discussion of (1), this Court noted:

"In finding that California's law falls within the literal terms of Justice Chase's second category, we do not deny that it may fall within another category as well. Justice Chase's fourth category, for example, includes any 'law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.' *Calder, supra*, at 390, 1 L Ed 648. ... Indeed, this Court once described statutes of limitations as creating "a presumption which renders proof unnecessary." *Wood v. Carpenter,* 101 U.S. 135, 139, 25 L. Ed. 807 (1879). Consequently, to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient.... Nonetheless, given Justice Chase's description of the second category, we need not explore the fourth category, or other categories, further."

Stogner v. California, 539 U.S. at 615-616, 123 S. Ct. at 2452, 156 L. Ed. 2d at 554-555, emphasis in original.

This Court continued:

"...likely for the reasons just stated, numerous legislators, courts, and commentators have long believed it well settled that the Ex Post Facto Clause forbids resurrection of a time-barred prosecution."

Stogner v. California, 539 U.S. at 616, 123 S. Ct. at 2452, 156 L. Ed. 2d at 555.

The above discussion made it clear that, in this Court's view, "resurrection of a time-barred prosecution" was what former section 803(g) did in ***all*** cases. What former section 803(g) did in ***Stogner's*** case was to violate Judge Learned Hand's rule that "extending a limitations period after the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.'" *Falter v. United States*, *supra*. In both situations, not just the Learned Hand situation, the Ex Post Facto clause would be violated.

Contrasting the type of statutes discussed above, including former section 803(g), this Court then discussed cases that had approved what this Court termed "extensions of unexpired statutes of limitations (extensions that our holding today does not affect.) The statutes of limitations involved in the 30 or so cases this Court discussed were all of the same type – statutes that merely lengthened an existing statute of limitations before it had expired. In *Falter v. United States, supra*, for example, the statute of limitations at the time of Falter's offense was three years. Congress' lengthening of the statute of limitations to six years was held valid as applied to Falter, whose three-year statute of limitations had not yet run when the amendment was enacted.

But former section 803(g) was not one of these "extension" statutes. Although this Court's opinion ultimately found section 803(g) "unfairly retroactive as applied to Stogner" (completely appropriate since Stogner's situation was the one before this Court), this Court had already indicated that former section 803(g) would violate the Ex Post Facto Clause under Judge Chase's second category even as applied to cases in which underlying statutes of limitation had not expired at the time former section 803(g) was enacted.

b. The decisions of the California Court of Appeals opinion and the lower federal courts were contrary to the clearly established federal law set forth in *Stogner*.

(1) *Stogner* set forth established federal law, not a new rule.

28 U.S.C. section 2254(d) bars federal courts from granting habeas corpus relief unless the state court's adjudication of the claim:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States..."

In *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), this Court equated the phrase "clearly established Federal law" as equivalent to "whatever would qualify as an old rule" under *Stringer v. Black*, 503 U.S. 222, 228, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). *Stringer* contrasted the term "old rule" with "new law", and points out that a decision of this Court decision announcing "new law" only applies to a state court conviction and sentence that had not become final at the time of the decision. *Stringer v. Black*, 503 U.S. at 227, citing *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990).

Under this definition, this Court clearly stated an "old rule" in *Stogner*, rather than "new law." This Court held that it had been clearly established that "authoriz[ing] criminal prosecutions that the passage of time had previously barred." would violate the Ex Post Facto clause of Article 1, section 10, clause 1 of the United States Constitution. *Stogner v. California*, 123 S.Ct at 2449, 156 L.Ed.2d at 551. This Court traced this principle back to *Calder v. Bull*, 3 Dall. 386, 391, 1 L. Ed. 648 (1798), holding that the principle "has long been accepted as clearly settled" and that section 803(g) represented:

"a kind of extreme variant that, given the legal consensus of unconstitutionality, has not likely been often enacted in our Nation's history. Cf. 1 J. Bishop, Criminal Law 5 219a, p 127 (rev. 4th ed. 1868) (declining to answer whether a law reviving time-barred prosecutions was *ex post facto* in part because 'it is not likely to come before the courts.') .... In assessing the case law, we find the essential fact to be the unanimity of judicial views that the kind of statute before us is *ex post facto*."

Stogner v. California, 123 S.Ct. at 2459-60, 156 L. Ed. 2d at 563-4.

(2) The decisions of the California Court of Appeal and the lower federal courts were all contrary to *Stogner*.

(a) Introduction

The California Court of Appeal and the lower federal courts all purported to rely on *Stogner's* discussion of "extension" statutes in holding that former section 803(g) did not violate the Ex Post Facto Clause, as applied a defendant like petitioner, whose alleged offenses occurred on January 1, 1988 or later.[7] The various courts used somewhat different reasoning to arrive at that conclusion, however.

(b) The California Court of Appeal's attempt to deem former section 803(g) a permissible "extension" statute as a matter of *State* law was contrary to *Stogner*.

The Court of Appeal relied on a portion of *Stogner* that contrasted "extension" statutes with statutes "authorizing criminal prosecutions

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[7] This date marks the beginning of the six years prior to the effective date of former section 803(g), January 1, 1994, reflecting the existing six year statute of limitations then set forth in former California Penal Code section 800.

that the passage of time had previously barred" and on a statement in the California Supreme Court's *People v. Frazer* (1999) 21 Cal.4th 737 that 803(g) "serves to prolong, rather than shorten, the time in which a felony child molestation prosecution may be brought."

> "Thus, for those offenses committed before January 1, 1994, but where the statute of limitations in section 800 or 801 had not yet expired as of that date, section 803(g) ***can be read as*** "extending" the statute of limitations so that a prosecution is timely if it is commenced no more than one year after a victim reports the abuse to an appropriate law enforcement agency."

People v. Renderos, 114 Cal. App. 4th at 966, emphasis added.

"Can be read" – by whom? The Court of Appeal's reference to *People v. Frazer* suggested that California's Supreme Court could render former section 803(g) constitutional by deeming it to be an "extension" statute as a matter of *State* law, and thus exempt it from *Stogner*'s holding! Such reliance on *Frazer* was rather obviously contrary to clearly established Federal law as set forth in *Stogner:*

First, *Stogner* had thoroughly rejected *Frazer's* categorical holding that the Ex Post Facto Clause did not apply to statutes of limitation.

Second, at the very least, *Stogner*, at the very least, had held that the determination of what a permissible "extension" law is, is a matter of Federal constitutional law, not a matter of State court construction of its statutes. The Court of Appeal's extreme version of federalism, which would leave it up to the States to determine what federal law is.

Third, even if the State courts could deem former section 803(g) as an "extension" statute as a matter of State law, the California Legislature had already specifically provided that the effect of former section 803(g) is to "revive any cause of action barred by [prior

statutes of limitations]." 1996 Cal. Stats. ch. 130, § 1 (codified at California Penal Code section 803(g)(3)(A).

Fourth, *Frazer's* comment clearly referred to *all* of former section 803(g), not simply former section 803(g) as applied to prosecutions for offenses allegedly occurring on January 1, 1988 or later! The notion that *all* of former section 803(g) could be a permissible extension statute under *Stogner*, even though *Stogner* clearly invalidated section 803(g) in Stogner's case, was absurd and self-contradictory.

Fifth, of course, *Stogner* had already held that former section 803(g) was an impermissible ex Post Facto law under Judge Chase's second category, not an extension statute.

This is not the first time that this Court has had to deal with the California courts' breezy attempts to "deem" their statutes in compliance with this Court's decisions as a matter of *State* law. In the recently decided case of *Cunningham v. California*, – U.S. —, 127 S. Ct. 856; 166 L. Ed. 2d 856 (2007), this Court invalidated California's determinate sentencing law as an impermissible system that exposed a defendant to a sentence in excess of the relevant statutory maximum based on facts not found beyond a reasonable doubt by a jury in violation of its previous decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In doing so, this Court remarked:

"Contrary to the *Black* [8] court's holding, our decisions from

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[8] *People v. Black*, 35 Cal. 4th 1238, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (2005).

Apprendi to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum. Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.

Respondent and its amici argue that whatever this Court makes of California's sentencing law, the Black court's "construction" of that law as consistent with the Sixth Amendment is authoritative. Brief for Respondent 6, 18, 33; Brief for Hawaii et al. as Amici Curiae 17, 29. We disagree. The *Black* court did not modify California law so as to align it with this Court's Sixth Amendment precedent. See 35 Cal. 4th, at 1273, 113 P. 3d, at 555-556 (Kennard, J., concurring and dissenting). Rather, it construed this Court's decisions in an endeavor to render them consistent with California law. The *Black* court's interpretation of federal constitutional law plainly does not qualify for this Court's deference."

Cunningham v. California, — U.S. —, 127 S. Ct. 856, 876, n. 16, 166 L. Ed. 2d 856 (2007).

(c) The Ninth Circuit's attempt to independently construe former section 803(g) as a permissible "extension" statute under *Stogner* was contrary to *Stogner*.

The federal district judge apparently accepted the Court of Appeal's bizarre argument that it could deem former section 803(g) to be an "extension" statute as a matter of State law. See opinion, pages 11-12. The Ninth Circuit panel did not go so far, but purported to interpret former section 803(g), as applied to petitioner, as if it were one of the "extension" statutes exempted from *Stogner*. As the Ninth Circuit remarked:

> "Section 803(g) seamlessly, albeit conditionally, extends the statute of limitations immediately upon expiration of the other periods. Thus, there is never a period in which a putative defendant is subject to 'punishment, where [he] was not, by law, liable to any,' *Stogner*, 539 U.S. at 612 (quoting *Calder v. Bull*, 3 U.S. 386, 389, 1 L. Ed. 648, 3 Dall. 386 (1798)), " until one year after the victim files a report with the proper authorities."

Renderos v. Ryan, 469 F.3d 788, 795 (9th Cir. 2006)

But, as discussed above, however, in *Stogner*, this Court had already construed former section 803(g) as a statute that "permits resurrection of otherwise time-barred criminal prosecutions." *Stogner v. California*, 539 U.S. at 609, 123 S. Ct. at 2448, 156 L. Ed. 2d at 550. Thus, the Ninth Circuit's opinion was a blatant and impermissible attempt to rewrite, not interpret, *Stogner*.

Even if this Court had not been so explicit, former section 803(g) does not fit within the category of "extension" statutes that *Stogner* exempted. It does not merely lengthen an existing statute of limitations in the manner that the three year statute in *Falter v. United States* had been permissibly increased to six years before it had expired. By its own terms, and in effect, former section 803(g) "revive(s) any cause of action barred by [prior statutes of limitations]." *Stogner v. California*, 539 U.S. at 609, 123 S. Ct. at 2449, 156 L. Ed. 2d at 550, quoting 1996 Cal. Stats. ch. 130, § 1

The Ninth Circuit's holding that " there is never a period in which a putative defendant is subject to 'punishment, where [he] was not, by law, liable to any'" misquotes both *Stogner* and *Calder v. Bull*. Judge Chase did not use the phrase "subject to punishment" in *Calder*. His Category 2 of ex post facto laws read:

"[A]t other times they inflicted punishments, where the party was not, by law, liable to any punishment."

Stogner does contain "subject to" language, but this Court, by that phrase, did not mean that a defendant might be prosecuted or punished at some hypothetical future date when , but not presently. By "subject to" punishment, the Supreme Court meant punished or prosecuted now. A statute that makes an individual "subject to" prosecution at some future date for a past offense, when he is not "subject to" prosecution now is a statute that provides for revival of a time barred prosecution, which Stogner found unconstitutional.

The Ninth Circuit also held: "the fact that the extension is conditional is a distinction without a relevant difference. Subsections 803(g)(2)(A)-(C) state conditions that must be satisfied by the prosecution before extending the limitations period." *Renderos v. Ryan*, 469 F.3d 788, 795 (9th Cir. 2006). The "catch" here, of course, was the word "conditional." Former section 803(g) does not state "conditions precedent" (if one is to use that kind of archaic contract language) for "extending" a limitations period. It states a "condition subsequent." Upon the happening of this condition, (which occurs after a statute of limitations has expired), the prosecution has a year to file charges. Re-instituting the ability to file charges upon occurrence of a "condition subsequent" is simply another name for a statute that permits the resurrection of otherwise time-barred criminal prosecutions, which *Stogner* held to violate the Ex Post Facto Clause.

(d) Conclusion

The decisions of the Court of Appeal and lower federal courts are simply contrary to *Stogner*. This court decided that former section 803(g) was an unconstitutional Ex Post Facto law for two reasons. One reason (the *Learned Hand* rule) applied specifically to people in Stogner's position. The other reason (Judge Chase's category 2),

however, applied to everyone whose prosecution would depend on former section 803(g)'s ability to revive a time barred prosecution.

This Court has made its ruling, but the lower courts refuse to follow it. Accordingly, this Court must grant certiorari.

3. The Fifth, Sixth, and Fourteenth Amendments require that all of the facts necessary to prove that the prosecution was brought within the time limitations set forth in section 803(g) be proven beyond a reasonable doubt.

Former section 803(g) requires that its facts be proven only by "clear and convincing evidence", which is less than proof beyond a reasonable doubt. This was the standard followed at petitioner's trial.

This Court has have long held that the due process clauses of the Fifth and Fourteenth Amendments to the Constitution require proof of every element of a criminal charge beyond a reasonable doubt. See, e.g., *Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989), citing *In re Winship*, 397 U.S. 358, 364 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Miles v. United States*, 103 U.S. 304, 312, 26 L. Ed. 481; 13 Otto 304 (1881).

In addition, in construing the general federal criminal statute of limitations, 18 U.S.C. section 3282, this Court has held (or at least assumed) that the issue of whether the charges have been brought within that statute of limitations is also an element of an offense that must be proven beyond a reasonable doubt, *Grunewald v. United States*, 353 U.S. 391, 396, 77 S.Ct. 963, 969-970, 1 L.Ed.2d 931 (1957). The federal circuits, including the Ninth Circuit, have generally construed *Grunewald* as requiring that the occurrence of an overt act within the limitation period of section 3282 must be proven beyond a reasonable doubt. See cases cited in section 1(b) of this petition, pages 12-13. As there is no logical distinction between the

conspiracy statute of limitations and any other, *Grunewald* and its progeny strongly suggest that established federal law requires a statute of limitations to be proven beyond a reasonable doubt.

In addition, in the last few years, the Supreme Court has recognized that the Sixth and Fourteenth Amendment's requirement of proof beyond a reasonable doubt extends beyond the factors traditionally identified as "elements of a crime" to include facts that merely increase the penalty for a crime above the maximum allowed absent proof of such facts.. *Cunningham v. California, supra, United States v. Booker, supra, Blakely v. Washington, supra, Ring v. Arizona, supra, and Apprendi v. New Jersey, supra.*

And then, of course, there is this Court's decision in *Stogner.*

In describing the four categories of Ex Post Facto laws set forth by Justice Chase in *Calder v. Bull*, this court focused on Category 2, and remarked:

> "The second category--including any "law that *aggravates a crime,* or makes it *greater* than it was, when committed," *id., at 390, 1 L Ed 648* --describes California's statute as long as those words are understood as Justice Chase understood them--*i.e.,* as referring to a statute that "inflict[s] *punishments,* where the party was not, by *law,* liable to *any punishment,*" *id., at 389, 1 L Ed 648*....After (but not before) the original statute of limitations had expired, a party such as Stogner was not 'liable to any punishment.'"

Stogner v. California, 539 U.S. at 611-612, 123 S. Ct. at 2450, 156 L. Ed. 2d at 552. Since, under *Stogner*, the expiration of statute of limitations renders a defendant not liable for punishment, and under the *Apprendi-Cunningham* line of cases, any fact that increases punishment above the maximum that can be imposed absent proof of

such fact must be proven beyond a reasonable doubt, it follows that any fact that makes the difference between punishment and no punishment at all (i.e., that the charged offense falls within the statute of limitations) must be proven beyond a reasonable doubt under established federal law. It would be an anomaly worthy of a Kafka if facts that merely *increase* punishment have to be proven beyond a reasonable doubt, but a fact allowing punishment to be imposed in the first place can be proven to some lesser certainty consistent with the Constitution.

In upholding former section 803(g)'s built in standard of proof of less than a reasonable doubt, the California Court of Appeal in *People v. Renderos* relied on a line of state cases traceable to the 1935 decision of *People v. McGill* (1935) 10 Cal.App.2d.155. *McGill* was a state case from the era of *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), in which the U.S. Supreme Court had held that the Bill of Rights was not incorporated in the Fourteenth Amendment's due process clause. The Court of Appeal thus did not consider whether the burden of proof was any restraints imposed by the United States Constitution.

The Ninth Circuit relied on a single Ninth Circuit case, *United States v. Gonsalves*, 675 F.2d 1050 (9th Cir. 1982). *Gonsalves*, however, did not concern the statute of limitations under section 3282 itself, but instead, the "fleeing from justice" tolling provision of 18 U.S.C. section 3290. The Ninth Circuit held that proof of the tolling provision was unrelated to guilt and thus did not require proof beyond a reasonable doubt. *Id.* at 1054.

Gonsalves thus did not address the required standard of proof for a criminal statute of limitations and predated both *Stogner* and the *Apprendi-Cunningham* line of cases. To the extent that the Ninth Circuit in *Renderos v. Ryan* relied on *Gonsalves* as establishing the constitutionally required standard of proof for a criminal statute of

limitations, the Ninth Circuit contradicted its own established precedent, contradicted the law of this Court and the other Federal Circuits, and was wrong.

CONCLUSION

For the above reasons, this honorable Court should grant certiorari in this case.

Dated: Oakland, California, Friday, April 13, 2007.

Robert Joseph. Beles

Paul Gilruth McCarthy
Attorneys for *Petitioner*
VICTOR MANUEL RENDEROS

APPENDIX

(I) Opinions, Orders, Findings of Fact, and Conclusions of Law, Whether Written or Orally Given and Transcribed, Entered in Conjunction with the Judgment Sought to Be Reviewed

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VICTOR MANUEL RENDEROS, Petitioner-Appellant

v.

STUART RYAN, Warden, California State Prison, Calipatria, Respondent-Appellee.

No. 05-16454

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

469 F.3d 788; 2006 U.S. App. LEXIS 27559

April 5, 2006, Argued and Submitted, San Francisco, California
November 8, 2006, Filed

PRIOR HISTORY: [1] Appeal from the United States District Court for the Northern District of California. Charles R. Breyer, District Judge, Presiding. D.C. No. CV-04-05250-CRB. *Renderos v. Ryan*, 2005 U.S. Dist. LEXIS 14368 (N.D. Cal., July 7, 2005)

DISPOSITION: Affirmed.

COUNSEL: Anne C. Beles, Robert J. Beles, and Paul McCarthy, Oakland, California, for the appellant.

Gregg E. Zwycke, Bill Lockyer, Robert R. Anderson, Gerald Engler,

and Peggy S. Ruffra, San Francisco, California, for the appellee.

JUDGES: Before: Eugene E. Siler, Jr., * Johnnie B. Rawlinson, and Jay S. Bybee, Circuit Judges. Opinion by Judge Siler.

* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

OPINION BY: Eugene E. Siler , Jr.

OPINION:

[*790]

SILER, Circuit Judge:

Petitioner Victor Renderos appeals the denial of his petition for a writ of habeas corpus. Because Renderos identifies no "clearly established federal law" that was misapplied or violated by the California Court of Appeal, and does not contend that there was an unreasonable determination of the facts, we deny the petition.

I. n1 n1 These facts are taken largely from the district court's recitation of the California Court of Appeal decision.

[2]

Renderos dated Lisa C. during the early 1990s. She had two sons, Ryan and Jordan, both of whom were under 14 years old. Renderos spent a lot of time with Lisa and her sons, and Ryan thought of Renderos as a father. However, the relationship ended after a few years, sometime in the mid 1990s.

When Ryan was seventeen, he told his mother that Renderos had

sexually molested him. He had not previously said anything to his mother because the incidents made him feel "gay" and he feared he would get in trouble. On March 19, 2001, Ryan reported the abuse to the police. One month later, investigators taped two telephone conversations between Ryan and Renderos. Ryan asked Renderos whether he remembered the molestations and asked why Renderos had molested him. Ryan reminded Renderos about an incident that had occurred on a canoeing trip and asked why Renderos had touched him. Renderos at first stated he did not remember the trip and denied touching Ryan when he was little. Renderos then stated,

> But don't worry about shit like that, Man. That was something that, you
>
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>
> know, happened a long time ago and that you -- we just did some playing around, you know? . . . No big thing.

During [3] the second call, Ryan asked Renderos for advice about problems which he thought were based upon his past. Renderos protested,

> Hey, come on over, Man. You know . . . things like that happen. Hey, it was just -- you was crazy at the time. You remember that . . . . You know, you were crazy and you want to experiment things, you know and things like that. You're the one that motivated the whole thing, you know? Just let the guilt out of your head.

Ryan further stated he was bothered by Renderos's act of "always, like, mak[ing] me put my hand on your penis." Renderos replied, "Oh well, you know? You -- you wanted to do that. You know remember?

You wanted to." When Ryan wondered why this was relevant given that he was only eight years old then, Renderos claimed:" You were about 12, Man. You were old, already. . . . I didn't meet you when you was eight. You were older than that." When Ryan again stated it was not normal for "guys to grab each other's dicks," Renderos replied, "Oh, it's a -- I know. Yeah, I couldn't figure out why you want to do it. Remember that?" When Ryan said he did not really want to do it but Renderos forced his hand, Renderos replied, "No, you're . . . [4] the one. You started out, remember, you wanted to experiment crazy things. You . . . were always doing crazy things. Remember that?" When Ryan again said he did not understand why Renderos wanted Ryan to "try to suck his dick" because it was like Renderos was using Ryan to get what he wanted, Renderos replied,

> Oh, no. Huh-uh. No, no. You got me wrong . . . . You're the one that always wanted it. Remember the way you are, Man. The way you used to be. You want to do this, you want to do that . . . . I didn't force you into doing anything. You're the one that motivated everything. Think about that.

Ryan stated he did not know how he had motivated the sex because he was too young, to which Renderos replied, "Well, you knew what you were doing, Bro."

The remainder of the telephone conversation continued in the same vein, with Ryan asking Renderos if he remembered the sexual encounters, and Renderos telling Ryan to forget about the incidents and inviting Ryan to talk to Renderos more about the incidents because then they might stop bothering him.

Five days after the telephone conversations, on April 25, 2001, California filed a criminal complaint against Renderos charging [5] him with various and multiple counts of felony sex offenses.

At trial, Ryan testified that the incidents began when he was only eight years old. The first incident occurred during a canoeing trip on the Russian River. After urinating next to each other, Renderos took Ryan's hand, placed it on Renderos' penis and told Ryan to keep it there. Ryan withdrew his hand after a few seconds. The second incident occurred about two months later. Renderos was at Ryan's home for the nightly dinner with the family. After dinner, Ryan's mother left the house to attend to her real estate business. Ryan was in his bedroom changing his clothes when Renderos came in. Renderos reached through the opening in Ryan's boxer shorts and pulled on Ryan's penis for a few seconds. Renderos then placed Ryan's hand on his penis and instructed Ryan to pleasure him.

The sexual abuse, which Ryan described as "touching, the[n] me jacking him off," became more frequent as Ryan got closer

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to nine. Ryan testified that it occurred "at least once every three days." In addition to the forced masturbation, Ryan testified that when he was nine or ten, he was forced to orally copulate Renderos; and on a few occasions, Renderos [6] used his finger and once used his penis to penetrate Ryan's rectum. Ryan testified that the abuse occurred from the time he was eight years old until he was eleven.

Renderos testified on his own behalf and denied molesting Ryan on any occasion. He claimed that he met Ryan's mother sometime in 1992 or 1993, and he dated her for three or four years. He could not recall how old Ryan was when he first met the boy; he thought Ryan must have been around ten years old at the time. He testified that although he ate dinner at their home almost every night, he never inappropriately touched Ryan. Renderos testified that practically every night that he was at Lisa's home, he and Lisa had intimate relations in

her bedroom after the boys went to bed, and that he left at about 11:00 p.m. He recalled caring for the boys on only five occasions without their mother.

Renderos explained that his statements during the recorded telephone calls with Ryan referred to incidents that took place when Ryan was eleven or twelve years old. On a few occasions, after having sex with Ryan's mother, Renderos came out of Lisa's bedroom to find Ryan outside the bedroom door. He recalled Ryan once asking coyly, "how [7] do [you] like my mother's . . . female part?" Renderos said Ryan would grab [Renderos's] penis through his clothes. Renderos told Ryan to stop touching him and told Lisa about the incidents, suggesting they have intimate relations later in the evening. The incidents happened on five occasions. Renderos claimed all the statements he made on tape were references to these incidents instigated by Ryan.Renderos was found guilty of one count of committing continuous sexual abuse (during a four-month period when Ryan was eight years old), one count of oral copulation (when Ryan was nine or ten years old), one count of sexual penetration with a foreign object (when Ryan was ten years old), and 23 counts of committing a lewd act on a child under 14 (each count covering a one-month interval from September 1, 1992 through July 31, 1994 when Ryan was eight, nine, and ten years old). Although the statute of limitations had expired under CAL. PEN. CODE §§ 800 and 801, the jury found that the prosecution satisfied the predicate requirements under Section 803(g), which made the prosecution timely. The trial court sentenced Renderos to an aggregate term of 66 years in prison. [8]

On direct appeal, the California Court of Appeal denied summary reversal. See *People v. Renderos*, 114 Cal. App. 4th 961, 8 Cal. Rptr. 3d 163 (Cal. Ct. App. 2003) (partially published). The California Supreme Court denied review. See *People v. Renderos*, 2004 Cal.

LEXIS 3290 (Cal. April 14, 2004). The district court denied Renderos's application for a writ of habeas corpus. The court issued a Certificate of Appealability ("COA")on several grounds: (A) that application of CAL. PEN. CODE § 803(g), which extended the statute of limitations for sex offenses with minors, is a violation of the Ex Post Facto Clause as declared by the Supreme Court in Stogner v. California, 539 U.S. 607, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003); (B) that it was error to hold that the conditions for invoking section 803(g) could be proven by a standard lower than "reasonable doubt"; (C) that it violated due process to admit evidence of Renderos's other bad acts; (D) that it was prejudicial prosecutorial misconduct

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to refer to stricken testimony by the victim's mother during closing argument; (E) that Renderos was prejudiced by trial counsel's ineffective assistance; and (F) [9] that there was cumulative error.

II. This appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Subsection (d) states: An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

To be an "unreasonable" application of Supreme Court precedent, a

state court decision has to be more than merely "erroneous," *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); it must be "objectively unreasonable," *Williams v. Taylor*, 529 U.S. 362, 409, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Thus, the object of our inquiry is not to revisit the merits underlying the conviction, see *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), [10] but rather to look to the highest state court to render a reasoned decision and inquire whether the conviction was procured in violation of the constitution or federal law, see *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002).

A.

Renderos contends that CAL. PEN. CODE § 803(g) violates the Ex Post Facto Clause of the United States Constitution. See U.S. CONST., art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . ."). The six- and three-year limitations periods under CAL. PEN. CODE §§ 800 and 801, respectively, each of which was applicable to certain charges, expired on his case by early 2001. n2 Relying almost exclusively on Stogner, 539 U.S. at 614-15, Renderos claims that Section 803(g) n3 impermissibly revived the limitations period. Section 803(g) states:

> (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under [11] the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.

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> (2) This subdivision applies only if all of the following occur:

(A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.

(C) There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation.

(3) No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

n2 The limitations periods depend upon the maximum punishments, and Renderos was charged under different statutes with differing maximum penalties. See CAL. PEN. CODE § 800 ("[P]rosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense."); CAL. PEN. CODE § 801("[P]rosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense."). The parties agree that the limitations period under both provisions had lapsed by the time the criminal complaint was filed.

[12]

n3 This was the applicable subsection numbering at the time. In 2005, and after litigation commenced, California amended the statute deleting the old subsection (f) and renumbering the old subsection (g) as subsection (f) without any substantive alterations. We refer to the statute as the parties have in its pre-

amendment form.

Thus, Renderos contends, § 803(g) is a violation of the Ex Post Facto Clause because by its terms,it only applies to those charges on which the original period under §§ 800 and/or 801 has lapsed.

The California Court of Appeal, the highest state court to review this case on the merits, rejected the same argument:

> The proviso that the subsection does not apply unless the statute of limitations has expired in section 800 or 801, "obviously ensures that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 or 801 where [the victim] reports the crime to a qualifying law enforcement agency before the three-year or six-year period set forth in the latter provisions 'has expired.' In this way, the limitations period in [13] Section 803(g) -- like other 'tolling' and 'extension' provisions in the same statute -- serves to prolong, rather than shorten, the time in which a felony child molestation prosecution may be commenced." (People v. Frazer, [21 Cal.4th 737, 752, 88 Cal. Rptr. 2d 312, 982 P.2d 180 (1999)]).
>
> . . . .
>
> That the People could not prosecute an action until a report was filed by the victim . . . does not support Renderos's contention [that] the statute as applied to him had the effect of "reviving" a prosecution barred by the statute of limitations. Because the statute of limitations under section 800 had not expired when section 803(g) became effective on January 1, 1994, section 803(g) permitted the People to commence prosecution for the offenses within one year after the filing of Ryan's report, notwithstanding the limitation period in section

800.

Renderos, 114 Cal. App. 4th at 966 (footnote omitted). The California Court of Appeal did not misapply Stogner, nor any other clearly established Supreme Court precedent prohibiting ex post facto laws.

First, *Stogner* is materially distinct from the case before us. There, the Supreme Court addressed whether a different [14] provision, CAL. PEN. CODE § 803(g)(3)(A) (1996), violated the U.S. Constitution's ban on ex post facto laws. Stogner was charged in 1998 for sex-related acts with minors that allegedly occurred between 1955 and 1973. See 539 U.S. at 609. The statutes of limitations under §§ 800 and 801 which also covered those charges had long since run. Id. at 610. In 1994, California enacted CAL. PEN. CODE § 803(g), and a 1996 amendment -- now repealed per Stogner -- provided that satisfaction of the conditions in § 803(g)(2) "shall revive any cause of action barred by [prior statutes of limitations]." CAL. PEN. CODE § 803(g)(3)(A) (1996) (alteration omitted).

The Supreme Court found the law unconstitutional, holding that a statute enacted

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after the expiration of a statute of limitations and that revives prosecution is a classic ex post facto law and is no different from a statute that authorizes punishment for an act that was not illegal at the time it was committed. *Stogner,* 539 U.S. at 614-15. The Court also held that the case represented another type of Ex Post Facto [15] Clause violation where there is a reduction in the quantum of proof necessary to convict, observing that "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict." Id.at 615 (citing *United States v. Marion*, 404

U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)). However, the critical element in both of these holdings was the fact that the amendment in question became effective after the statute of limitations had already expired. *Stogner*, 539 U.S. at 618-19. The Court observed that the evils sought to be avoided by the Ex Post Facto Clause were visited upon Stogner because he went years under the belief that he would not be prosecuted, and there was an irrebuttable presumption that one is prejudiced under such a belief. See id. at 611.

Here, § 803(g) was enacted while the limitations periods were still running on the claims against Renderos. This is, therefore, precisely the type of statute that *Stogner* expressly stated it was not striking down. See id. at 618-19. Renderos identifies no other case on point. Therefore, we cannot [16] conclude that the California Court of Appeal's determination was "contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. . . ." 28 U.S.C. § 2254. Furthermore, Renderos's canonical invocations of *Stogner's* verbiage are equivocal and unavailing. He essentially argues that had § 803(g) directly extended -- or even abolished -- the limitations periods in §§ 800 and 801, then it would not have run afoul of the Constitution, but that because it is a different limitations period that is triggered once the other periods expire, it amounts to a revival statute of the type criticized by the Supreme Court. However, contrary to Renderos's mistaken belief, § 803(g) seamlessly, albeit conditionally, extends the statute of limitations immediately upon expiration of the other periods. Thus, there is never a period in which a putative defendant is subject to "punishment[], where [he] was not, by law, liable to any," Stogner, 539 U.S. at 612 (quoting *Calder v. Bull*, 3 U.S. 386, 389, 1 L. Ed. 648, 3 Dall. 386 (1798)), until one year after the victim files a report with [17] the proper authorities. The fact that the extension is conditional is a distinction without a relevant difference. Subsections 803(g)(2)(A)-(C) state conditions that must be satisfied by

the prosecution before extending the limitations period. These, therefore, inure to a defendant's benefit by shielding him against potentially arbitrary prosecutions that the victim has not supported and against accusations supported by flimsy, stale, or uncorroborated evidence. See CAL. PEN. CODE § 803(g)(2)(A)-(C).

Finally, the application of § 803(g) to this case does not "threaten[] the kind of harm that . . . the Ex Post Facto Clause seeks to avoid." Stogner, 539 U.S. at 611. There is no manifest injustice here because there was no "retroactive effect," as the original limitations period had not yet expired. Id. For the same reason, Renderos cannot claim prejudice as he never became "safe from . . . pursuit" because he had notice and "fair warning" that even though the three- and six-year limitations periods would soon expire, he could still be prosecuted under

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§ 803(g). Id. (quoting *Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928), [18] cert. denied, 277 U.S. 590, 48 S. Ct. 528, 72 L. Ed. 1003)).

Therefore, we cannot conclude that the Court of Appeal misapplied clearly established Supreme Court precedent.

B.

Renderos claims that the jury should have been required to find beyond a reasonable doubt the conditions for triggering the extension under §§ 803(g)(2)(A)-(C). The trial court charged the jury with finding guilt beyond a reasonable doubt, but instructed the jury that after it found guilt, it had to find by clear and convincing evidence the elements of §§ 803(g)(2)(A)-(C). Renderos argues that because

California courts have treated statutes of limitations as elements of the offense, they have to be proven beyond a reasonable doubt.

In rejecting this claim, the California Court of Appeal held:

> Renderos's argument is based upon the premise that because a defendant cannot be convicted of an offense that is time-barred, the statute of limitations is an "element of the offense" that needs to be proved beyond a reasonable doubt. Concededly, the courts have described the statute of limitations as part of the People's case to plead and prove as any other "element" of the offense. . . . However, [19] our Supreme Court has consistently held the prosecution is required to prove any factual allegations regarding the statute of limitations only by a preponderance of the evidence in the absence of any other standard set by the legislature.
>
> We reject Renderos's contention that prevailing federal constitutional law concerning the burden of proof in criminal cases requires us to now declare the factual allegations concerning the statute of limitations should be deemed an element of the offense that must be established beyond a reasonable doubt. "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of an offense of which the defendant is charged." (*Patterson v. New York* (1977) 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281). In *Apprendi v. New Jersey* (2000)530 U.S. 466, 476, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435, the United States Supreme Court also held the federal constitution requires the prosecution to prove beyond a reasonable doubt any fact, other than a prior conviction, that increases the maximum punishment for the offense. However, no United States Supreme Court or lower

> federal court case holds, as a matter [20] of federal constitutional law, that the timeliness of a criminal prosecution must be proved beyond a reasonable doubt.

Renderos, 114 Cal. App. 4th 961, 8 Cal. Rptr. 3d 163, No. 097873, Calif. Ct. of Appeal, Dec. 30, 2003, pp.16-17 (unpublished) (some citations omitted).Here, the Court of Appeal did not err. Renderos fails to identify any Supreme Court precedent clearly establishing that statutes of limitations must be proven beyond a reasonable doubt. In fact, he concedes that no such case exists. Rather he relies on *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), for the proposition that any fact predicate to a conviction must be proven beyond a reasonable doubt. However, we do not read *In Re Winship* so broadly. Though every element of the crime must be proven beyond a reasonable doubt to convict, not every predicate to a conviction is an element of the crime.

In *In Re Winship*, the Supreme Court confronted the question of the quantum of

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proof necessary for the conviction of a juvenile offender in juvenile court. The Court observed that "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of [proof] . . . . It is critical that [21] the moral force of the criminal law not be diluted by a standard of proof that leaves peoplei n doubt whether innocent men are being condemned." 397 U.S. at 364 (citations omitted). The Court then held, "Lest there [be] any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."Id.

The findings necessary to trigger § 803(g)do not fall within the due process penumbra expounded in *In Re Winship*, and no subsequent case has so expanded it. Section 803(g) does not define a crime, and §§ 803(g)(2)(A)-(C) do not prescribe facts that "constitute the crime." 397 U.S. at 364. "Section 803(g) regulates the time at which child sexual abuse defined and punished elsewhere in the Penal Code may be charged." *Frazer*, 21 Cal. 4th at 760 (italics in original) overruled on other grounds by *Stogner*, 539 U.S. at 611. Directly on point is *United States v. Gonsalves*, 675 F.2d 1050, 1054 (9th Cir. 1982). [22] There, we addressed the appropriate standard of proof for the tolling provision in 18 U.S.C. § 3290, a statute applicable to persons fleeing the commission of a crime. Id. at 1052. Holding that the preponderance standard was the appropriate one, we observed that even though proving the factual element of the provision was necessary to convict, "[a] major reason for adhering to the 'reasonable doubt' standard is absent . . . when the evidence offered to prove a defense is unrelated to the issue of guilt." Id. at 1054. Thus, while the elements of §§ 803(g)(2)(A)-(C) were necessary to convicting Renderos, they did not need to be proven beyond a reasonable doubt because they did not bear upon his guilt vis-a-vis his innocence, such that there was the risk of an "innocent [man] . . . being condemned." See In Re Winship, 397 U.S. at 364.

Therefore, the California Court of Appeal was not objectively unreasonable in its application of Supreme Court due process law in rejecting Renderos's claim.

C.

During trial, the court admitted evidence of Renderos's statement to Ryan wherein Renderos attempted to have [23] Ryan secure him a young girl for a sexual encounter. n4 Renderos claims that these statements were the only ones admitted for "corroboration" as

required in Section 803(g), but were prejudicial because they

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showed "propensity." He also claims it was error to fail to give a limiting instruction once the evidence was admitted.

n4 The relevant portionof the transcript reads: [Renderos]

> Q: Hey, do you know any -- any ho's [sic] Man? Fix me up. [Ryan]
>
> A: No, I don't know no ho's. Q: Fix me up, Man. A: I'll see what I can do. Q: Fix me up. A: I'll see what I can do. Q: Something nice, and about 18, you know? A: Yeah. Q: I can, you know, legal. [Ryan]
>
> Q: You don't want 'em younger, maybe?
>
> A: Well I don't know. Am I -- Oh, you know? Never know.
>
> Q: All right. [Renderos]
>
> Q: See what you can do, Man. [Ryan]
>
> A: All right.
>
> Q: You know I like my pussy, Bubba.
>
> A: All right.
>
> Q: Whenever you want to talk. Whenever you have problems, call me, Man. Call me.

[24]

The trial court rejected defense counsel's objections, stating "In reading so far the areas of objection, especially page thirteen, I think

it goes far to describe the relationship between the alleged victim and defendant. And I think it is relevant to the charges."

The California Court of Appeal held:

> Initially, we note that in seeking to exclude this portion of the transcript, appellant did not raise any "propensity" argument nor did he request the trial court to caution the jury on the use of the evidence. (See *People v. Bolin* (1998) 18 Cal. 4th 297, 327-328, 75 Cal. Rptr. 2d 412, 956 P.2d 374 [trial court has no sua sponte duty to instruct the jury as to the use of other crimes evidence].) In any event, we need not address whether the trial court should have allowed into evidence the challenged part of the tape. Assuming for the sake of argument that the trial court should have excluded the challenged evidence, the error was harmless beyond a reasonable doubt. The prejudicial effect of the evidence was minimal given that it "was no stronger and no more inflammatory than the [evidence] concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Cal. 4th 380, 405, 27 Cal. Rptr. 2d 646, 867 P.2d 757.) [25] It is unlikely the "jury might [have] doubted that [Renderos] committed the charged offenses but convicted anyway because of a belief he committed [any] uncharged crimes." (citation omitted.). Accordingly, reversal on this basis is not warranted.

Renderos, p. 23. Renderos's principal objection to this holding is that it does not address the due process claim and that the inclusion of the transcript altered the jury's perception of his credibility. We disagree. A successful petition for collateral relief rooted in a claim of trial error must demonstrate actual prejudice, that is, a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353

(1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 758, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)). Renderos neither establishes that the evidence had a "substantial" effect on the jury nor proves how excluding the challenged portion would have detracted from the damning -- and unchallenged -- admissions contained in the balance of the transcripts. Cf. *Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004) (concluding [26] that erroneous admission of evidence of victim's violent character was harmless because defendant could not show a substantial influence on the jury's verdict). Furthermore, the challenged transcript is ambiguous in that Renderos did not accept Ryan's offer of a girl under 18, and Renderos said he wanted something "legal."

Therefore, the Court of Appeal did not err in holding that there was no constitutional violation.

D.

Renderos contends that he was prejudiced by the testimony of the victim's mother, and the trialprosecutor's subsequent reference to the statement during closing. The transcript reads inrelevant portion:

> Q: What kind of relationship did you have with your son, Ryan?
>
> A: Ryan had some signs of dysfunction. There was no doubt. He had some anger issues. I took Ryan to see psychologists. I took him to psychiatrists . . . . I didn't know what the problem was with Ryan . . . . [P] He's never

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> been in trouble outside of our home. Everything has always

been centered in our home. He would get angry, punch the door, hit the wall, things like this. I didn't know why.

Q: You are saying this all occurred approximately around 1992?

A: No. It started [27] a little time later . . . . [P] It started later.

Q: It's fair to say that this type of behavior was never present in Ryan before?

A: No.

Q: 1992?

A: No, both of my boys, and I say both of my boys have had problems, both of my boys have been molested.

The trial court sustained a motion to strike and instructed the jury to disregard the last sentence. The prosecutor then referred to this testimony during her closing argument to the jury:

I think what you saw from [victim's mother] was some really righteous emotion on the witness stand. She was upset . . . . What she said, you know, was emotional. I don't think you can read that to say she was some how making these things up to help the case along. . . . When we are talking about, you know, credibility, you can look at the witness' demeanor while they are testifying. You can look at Lisa . . . what she did, what she said, her emotions.

The Court of Appeal rejected Renderos's argument that the testimony and the later reference constituted prosecutorial misconduct:

> The record does not contain any evidence that the prosecutor knew or should have known Lisa was going to mention both her sons [28] had been molested. Moreover, the trial court directed the jury to disregard the testimony, and we assume the jury followed that instruction. (*People v. Sanchez* (2001) 26 Cal. 4th 834, 852, 111 Cal. Rptr. 2d 129, 29 P.3d 209.) Further, Renderos did not object or request any cautionary instruction regarding either Lisa's conduct or the prosecutor's references to the emotional nature of Lisa's conduct on the witness stand. In any event, to the extent any of the challenged comments were erroneous or inappropriate, it is not reasonably probable a different result would have been reached in the absence of those remarks. (*People v. Watson* (1956) 46 Cal.2d 818, 835, 299 P.2d 243.)

Renderos, p. 25.

On a petition for a writ of habeas corpus, the standard of review for a claim of prosecutorial misconduct is "the narrow one of due process, and not *the broad exercise of supervisory power.*" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). Thus, to succeed, Renderos must demonstrate that it "so infected the trial with unfairness as to make the resulting conviction a denial [29] of due process." *Donnelly*, 416 U.S. at 643.

Renderos claims that under *People v. Bentley*, 131 Cal. App. 2d 687, 690, 281 P.2d 1 (Cal.Ct. App. 1955) overruled on other grounds by *People v. White,50* Cal.2d 428, 325 P.2d 985 (1958), the prosecution had the affirmative duty to ensure that its witnesses did not volunteer inadmissible statements. However, in *Bentley*, in response to a question on direct examination, a police officer testified that he had

questioned the defendant in a previous child molestation case. Id. at 689. Here, the statement was elicited by defense counsel during cross examination. Furthermore, the testimony does not engender

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the degree of prejudice at issue in Bently. Lisa C. never stated she thought Renderos had molested her other son, and in any event the court gave an instruction to disregard the statement to which Renderos neither objected nor sought a stronger admonition. See *Kennedy v. Lockyer*, 379 F.3d 1041, 1061 n.3 (9th Cir. 2004) (juries are presumed to have followed court's instruction). During the closing, the prosecutor merely referred to the emotion of Lisa's testimony and did not repeat that both [30] of her sons had been molested. Given the telephone transcripts, which are more likely than not the principal basis upon which Renderos was convicted, the mere erroneous inclusion of inconsequential statements is insufficient to demonstrate that it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643.

E.

Renderos claims that trial counsel was ineffective and his errors prejudicial. However, there was no attempt to set forth the legal standards for such a challenge nor an attempt to meet them. We therefore deem the issue waived. See *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1993).

F.

Renderos contends that the errors should be considered cumulatively and not individually. However, the only issue identified above that might have been erroneous but deemed not prejudicial is the

admission of the testimony of Renderos's solicitation of Ryan to procure a young girl for sex. None of the other errors identified in the brief was disposed of solely on the grounds of failure to prove prejudice. Even assuming that Lisa's testimony should have been stricken, Renderos [31] does not argue how those two errors, even considered together, overcome the cumulative weight of the balance of the evidence against him.

III.

Thus, the California Court of Appeal's denial of relief was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent in holding that CAL. PEN. CODE § 803(g) was not a violation of the Ex Post Facto Clause under Stogner, nor in any of the other assignments of error. We also deny Renderos's request to expand the COA to include uncertified claims.

AFFIRMED.

(ii) Any Other Opinions, Orders, Findings of Fact, and Conclusions of Law Entered in the Case by Courts or Administrative Agencies

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Filed 12/30/03
CERTIFIED FOR PARTIAL PUBLICATION *

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

The People,
Plaintiff and Respondent,
V.
Victor Manuel Renderos, Defendant and Appellant.
A097873

In re Victor Manuel Renderos,
on Habeas Corpus.
A103588

(Solano County Super. Ct. No. VC 153448)

In this case we hold Penal Code section 803, subdivision (g) (section 803(g)), does not violate ex post facto principles when it is used to extend the unexpired time in which criminal charges may be brought for certain offenses involving substantial sexual conduct against minors.

After a jury trial, Victor Manuel Renderos was found guilty of 26 counts of sex offenses against a child under the age of 14 years, as designated in section 803(g). The usual statute of limitations for the

offenses was six years under Penal Code, section 800. Before the six-year period expired for each offense, however, section -803(g) was enacted. Section 803(g) permits the filing of a criminal complaint within one year of the victim's report of the offenses so long as the offenses involve defined substantial sexual conduct and there is independent evidence that clearly and convincingly corroborates the allegations. Based upon its true findings the section 803(g) requirements had been met for each offense, the jury determined the People had timely commenced the prosecution.

* This opinion is certified for partial publication only. (Cal. Rules of Court, rules 976(b) and 976.1.) The portions to be published are the three paragraphs of the introduction of the opinion, Part LA. of the Discussion, and the Disposition.

1

By a separate motion, Renderos now seeks summary reversal of his convictions, arguing the prosecution was barred by the six-year statute of limitations and any extension under section 803(g) was unconstitutional. In the published portion of the opinion, we conclude the application of section 803(g) to the offenses for which defendant was convicted does not operate as an ex post facto law. In the unpublished portion of the opinion, we conclude there is no merit to Renderos's additional arguments challenging his convictions and sentences; and we summarily deny his petition for a writ of habeas corpus based upon a claim his trial counsel was ineffective.

FACTUAL AND PROCEDURAL BACKGROUND

In the 1990s, Renderos, then in his early fifties, dated Lisa C., who had two children, Ryan, who was under 14 years old, and his younger brother, Jordan. Renderos spent a lot of time with Lisa and her sons. On an almost daily basis, after he finished work, Renderos went to Lisa's home for dinner and he then spent the evening with Lisa and

her sons before he returned to his home. Renderos was also present at holiday dinners and birthdays and he took trips with Lisa and her sons. Ryan thought of Renderos like a father. However, over a two-year period from May 1992 continuing to mid September 1994, Renderos molested Ryan on numerous occasions.

Ryan was eighteen years old at the time of trial. He described in detail the first two incidents that happened when he was eight years old.

The first incident occurred during a family trip to the Russian River. According to Ryan, it was spring but hot enough to go swimming. While Lisa remained on shore, Renderos and Lisa's sons went canoeing and then stopped near some bushes to urinate. Renderos and Ryan were standing at one bush, while Jordan was standing nearby at another bush. After urinating, Renderos took Ryan's hand, placed it on his (Renderos's) penis, and told Ryan to keep his hand there. Ryan left his hand there for a few seconds and then removed it. Driving home, Ryan rode with Renderos in his truck while Lisa and Jordan rode home in her car. Ryan did not tell anyone about the incident.

The second incident occurred about two months later. Renderos was at Ryan's home for the nightly dinner with the family. After dinner, Ryan's mother left the house to

attend to her real estate business. Ryan was in his bedroom changing his clothes when Renderos came in. Renderos reached through the opening in Ryan's boxer shorts, and pulled on Ryan's penis for a few seconds. Renderos then had Ryan place his own hand on Renderos' penis, and "jack [Renderos] off' until he ejaculated. No words were spoken during this incident. Ryan then got dressed, and he went into another room to watch television. Ryan did not say anything to

anyone about the incident.

The sexual abuse, which Ryan described as "touching, the[n] me jacking him off," continued on a more frequent basis as Ryan got closer to nine, with the third incident happening "a little bit after" the second incident, and then on an almost nightly basis, "at least once every three days." Ryan, however, was unable to recall how many times he was molested while he was still eight years old. But, he testified the abuse occurred from the time he was eight years old ..."[a]nd it started stopping when [he] was getting close to eleven. When [he] got to eleven, it just stopped." Ryan further testified from the time the sexual activity started until the time it ended, it occurred each month during that period of time; and once the molestation started, there were never any months when Renderos did not molest him.

In addition to the forced masturbation, Ryan testified he was eight to nine years old when Renderos first used his finger to penetrate Ryan's rectum. When Ryan was nine or ten, on one occasion he was forced to orally copulate Renderos, on a few occasions Renderos used his finger to penetrate Ryan's rectum, and on one occasion Renderos used his penis to penetrate Ryan's rectum.

About one year before the trial, when Ryan was seventeen, his girlfriend confided she had been molested, and in response, Ryan told his girlfriend he too was molested. His girlfriend encouraged Ryan to tell his mother about Renderos's conduct. Ryan testified once he spoke with his mother, "all my problems just stopped almost." Ryan had not previously said anything to his mother about the sexual abuse because he was afraid he would get into trouble and because the incidents made him feel gay. Ryan further testified a few months after the Russian River incident, Renderos told him not to talk about their sexual encounters; Renderos said he (Renderos) would get in trouble

Ryan should not discuss the matter with his mother. According to Detective James Matthews, Jr., Ryan reported he thought Renderos would kill his mother if he said anything about the abuse.

On March 19, 2001, Ryan reported the abuse to the police who recorded a statement from Ryan. One month later on April 20th, at the police station, Detective Matthews had Ryan place two telephone calls to Renderos in which Ryan asked Renderos whether he remembered the molestations and why Renderos had molested him. During the first telephone call, Ryan questioned Renderos about the first incident at Russian River and why Renderos always touched Ryan when he was little. Renderos at first stated he did not remember the trip or always touching Ryan when he was little. Renderos then stated, "But don't worry about shit like that, Man. That was something that, you know, happened a long time ago and that you -- we just did some playing around, you know? ... No big thing." Ryan prefixed the second telephone call by asking Renderos for counseling on a problem. To which Renderos told Ryan, "Hey, come on over, Man. You know ... things like that happen -- Hey, it was just -- you was crazy at the time. You remember that.... You know, you were crazy and you want to experiment things, you know and things like that. You're the one that motivated the whole thing, you know? Just let the guilt out of your head." Ryan then stated he was having sexual problems with his girlfriend, to which Renderos replied Ryan should not smoke any dope. Ryan replied he had not used any dope for six or seven months. When Ryan further stated he was bothered by Renderos's act of "always like make me put my hand on your penis ...," Renderos replied, "Oh well, you know? You -- You wanted to do that. You know remember? You wanted to." When Ryan said he was

eight years old, Renderos claimed: "You were about 12, Man. You were old, already.... I didn't meet you when you was eight. You were older than that." When Ryan again stated it was not normal for guys to grab each other's dicks, Renderos replied, "Oh, it's a -- I know. Yeah, I couldn't figure out why you want to do it. Remember that?" When Ryan said he did not really want to do it but Renderos got his hand, Renderos relied, "No, you're ... the one. You started out, remember, you wanted to experiment crazy things. You ... were always

doing crazy things. Remember that? When Ryan again said he did not understand why Renderos wanted Ryan to try to suck his dick because it was like Renderos was using Ryan to get what he wanted, Renderos replied, "Oh, no, no, no, no, no. Huh-uh. No, no. You got me wrong. You want to experiment things. You want to fuck around with this. You want to do that. You want to do this. You want to do that. [¶] You're the one that always wanted it. Remember the way you are, Man. The way you used to be. [¶] You want to do this, you want to do that.... I didn't force you into doing anything. You're the one that motivated everything. [¶] Think about that." Ryan stated he did not know how he had motivated the sex because he was young, to which Renderos replied, "Well, you knew what you were doing, 'Bro." The remainder of the telephone conversation, which is set out in the margin of the opinion, continued in the same vein, with Ryan continuing to ask Renderos if he remembered the sexual encounters, and Renderos telling Ryan to

forget about the incidents.[1] Five days after the telephone

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[1]The relevant part of the transcript of the recorded second telephone call reads as follows:

Q. [Ryan): ... I just think it's not normal for like you know, an older man to grab a kid's hand and put it on his dick.

A. [Renderos]: Oh, forget about that shit, you want to ... do things like that when you were younger, you want to do this, you want to experiment different things.

Q. But then remember, you would grab my dick, too. I mean -

A. You forget about these things. Just forget about those things and -- like I tell you,concentrate on now. Don't - - forget about then. Forget about that shit, Man. Concentrate on your girl....****

Q. I just don't get why you would grab me and shit, you know? That just bothersme.

A. Well, just forget about that shit, Man. Forget about the shit. Hey; come on over some day and we talk about it and get this in the open.. ..

Q. You're not [g]ay, are you?

A. Fuck, no.... [¶]

Q. Yeah?

A. I love pussy, Man. You know me better than that....

Q. But then why'd you grab me, Dude?

A. Forget about things like that. You were grabbing me you know and I was, you know, we were just fuckin' around and just forget about that shit.

- Q. All right. All right.

A. Put it in the ... past, forget about it, don't think about it and then when you want to [b]ullshit, come on over we can talk about it and. . get it in the open between you and me and then ... it won't bother you no more.

conversations, on April 25, 2001, the People filed a criminal complaint against Renderos, charging him with various felony sex offenses.

Renderos testified on his own behalf and denied molesting Ryan on any occasion. He claimed he met Lisa somewhere around 1992 or 1993, and he dated her for about three or four years. Renderos could not recall how old Ryan was when he first met the boy; he claimed Ryan must have been around ten years old. He confirmed Ryan's testimony that after he started dating Lisa, he ate dinner at Lisa's home on an almost nightly basis. However, Renderos claimed that practically every night he was at Lisa's .home, after the boys were asleep, he and Lisa had intimate relations in her bedroom and

then he left at about 11:00 p.m.[2] Renderos claimed Lisa did not work "that much" at night. He recalled caring for the boys on only five occasions.

Renderos explained his statements in the recorded telephone calls with Ryan referred to incidents that took place when Ryan was eleven or twelve years old. Specifically, on a few occasions, after having sex with Ryan's mother, Renderos came out of Lisa's bedroom to find Ryan outside the bedroom door. Renderos recalled Ryan saying, "[H]ow do [you] like my mother's . . . female part." Then, Ryan would grab Renderos's penis through his clothes. Renderos told Ryan to stop touching him. The
incidents happened on five occasions and then they just stopped.

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[2] Ryan's mother testified she usually had intimate relations with Renderos at his home and not in the presence of the children. She further testified there might have been a time when she was intimate with Renderos in her home after the children went to bed but she could not recall any such occasion.

Renderos told Lisa about the incidents, suggesting they have intimate relations later in the evening. During the two telephone calls with Ryan in April 2001, Renderos thought Ryan was referring to the incidents when Ryan had waited for him outside Lisa's bedroom and grabbed his penis as he emerged from the room. Renderos claimed all the statements he made on the tape were references to those incidents instigated by Ryan.

Renderos was found guilty of one count of committing continuous sexual abuse (during a four month period when Ryan was eight years old), one count of oral copulation (when Ryan was nine or ten years old), one count of sexual penetration with a foreign object (when Ryan was ten years old), and 23 counts of committing a lewd act on a child under 14 (each count covering a one-month interval from September 1, 1992 through July 31, 1994 when Ryan was eight, nine, and ten years old). The jury also found true factual allegations under section 803(g) making the prosecution timely as to each offense of which they found Renderos guilty[3] The trial court sentenced Renderos to an aggregate term of 66 years in prison.

DISCUSSION

I. Timeliness of Prosecution

A. Statutory Extension of Statute of Limitations

Renderos was convicted of felony sex offenses in violation of Penal

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[3] Because the jury was unable to reach a verdict on count two (alleging an act of sexual penetration with a foreign object when Ryan was nine years old), the trial court declared a mistrial on that count. Renderos was also charged but acquitted of one count of furnishing marijuana to a minor over the age of 14 years.

Code sections 288, 288a, 289, and 288.5 [4], committed between May 1, 1992 and September 19, 1994. Under section 800, the People were required to commence prosecution within six years of the commission of the offenses.. However, before the six-year period in section 800 expired for any of the offenses, the Legislature enacted section 803, subdivision (g) (section 803(g)). (Stats. 1993, ch. 390, § 1, eff. Jan. 1, 1994, amended Stats. 1996, ch 130, § 1, eff. Jan. 1, 1997, and Stats. 1997, ch. 29, § 1, eff. June 30, 1997.) Section 803 (g) currently provides, in relevant part: "(1) Notwithstanding any other limitation of time in [section 800 or 801], a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5. [¶] (2) This subdivision applies only if... [¶] (A) The limitation period specified in Section 800 or 801 has expired."

After Renderos filed his opening brief and the People filed their responsive brief, Renderos moved for summary reversal of the convictions, relying upon the United States Supreme Court's ruling in *Stogner v. California* (2003) 539 U.S. _ 123 S. Ct. 2446 (Stogner). In an order dated July 7, 2003, we deferred ruling on the motion. We now deny the motion for summary reversal.

In *Stogner, supra*, the United States Supreme Court held ex post facto principles barred the application of section 803(g) to those cases where the statute of limitations on the charged offenses had expired before January 1, 1994. (*Stogner, supra*, 539 U.S. , 123 S. Ct. at p. 2461.) The court, however, expressly noted its holding did not affect or otherwise "prevent the State from extending time limits ... for prosecutions not yet time barred." (Id. at p. , 123 S.Ct. at p. 2461.)

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[4] All further unspecified statutory references are to the Penal Code.

Thus, the only consequence of *Stogner* is

that any enumerated crime must be committed or the limitations period in section 800 or 801 must expire after January 1, 1994 (the effective date of the statute) in order for the extended one-year period to apply. Because the limitations period in section 800 for all the offenses charged in this case expired after January 1, 1994, section 803(g) does not violate any constitutional provision against ex post facto laws.[5] (See, also, *Harris v. Superior Court* (1988) 201 Cal. App. 3d 624, 630, fn. 3; *People v. Lewis* (1986) 180 Cal.App.3d 816, 822-823; *People v. Sample* (1984) 161 Cal.App.3d 1053, *People v. Eitzen* (1974) 43 Cal.App.3d 253, 266-267.)

Renderos acknowledges "the Legislature could probably have enacted an extension of the statute of limitations in section 800 in 1994 that would have survived a challenge as an ex post facto law." He contends, however, section 803(g), by its express terms, cannot be read as merely "extending" or "tolling" the statute of limitations for crimes committed before January 1, 1994, where the limitations period under section 800 or 801 had not expired. He premises his argument upon two factors: (1) the proviso in subsection (2) of section 803(g) that subdivision (g) applies only if "the limitation period specified in Section 800 or 801 has expired; " and (2) because there must always be an interim period in which the prosecution is time-barred (between the expiration of the statute of limitations in sections 800 or 801 and the filing of a report by the victim), section

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[5] Although the 1996 amendment to the statute expressly made section 803(g) retroactive to all offenses committed before, on, or after January 1, 1994 (§ 803(g)(3)(A)), that amendment did not change but merely clarified the effect of the 1994 law. (*People v. Frazer* (1999) 21 Ca1.4th 737, *753, abrogated on* other grounds in Stogner, supra, 539 U.S. at p. , 123 S. Ct. at p. 2453.)

803(g) cannot be interpreted as a "toll" or "extension" of the six year statute of limitations. Thus, he argues section 803(g) can only be read as "reviving" time-barred actions, which is prohibited by the ruling in Stogner. We conclude the statute can be read to withstand Renderos's ex post facto challenge. [6]

9

Subdivision (g) of section 803, provides: "Notwithstanding any limitation " in section 800 or 801, the People may pursue a prosecution of certain sexual offenses involving minors within one year from the time a victim files a report. The proviso that the subsection does not apply unless the statute of limitations has expired in section 800 or 801 "obviously ensures that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 or 801 where the victim reports the crime to a qualifying law enforcement agency before the three-year or six-year period set forth in the latter provisions 'has expired.' In this way, the limitations period in section 803(g) – like other 'tolling' and 'extension' provisions in the same statute - serves to prolong, .-. --' rather than shorten, the time in which a felony child molestation prosecution may be.' commenced." (*People v. Frazer, supra*, 21 Cal.4th at p. 752.) Thus, for those offenses committed before January 1, 1994, but where the statute of limitations in sections 800 or 801 had not yet expired as of that date, section 803(g) can be read as "extending" the statute of limitations so that a prosecution is timely if it is commenced no more than one year after a victim reports the abuse to an appropriate law enforcement agency. That the People could not prosecute the action until a report was filed by Ryan (*Ream v. Superior Court* (1996) 48 Cal.App.4th 1812, 1819), does not support Renderos's contention the

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[6] Renderos does not challenge the application of section 803(g) on the ground the law should not be given retroactive effect, an argument recently rejected by the Fifth District in *People v. Robertson* (2003) 113 Cal.App.4th 389.

statute as applied to him had the effect of "reviving" a prosecution barred by the statute of limitations. Because the statute of limitations under section 800 had not expired when section 803(g) became effective on January 1, 1994, section 803(g) permitted the People to commence prosecution for the offenses within one year after the filing of Ryan's report of abuse, notwithstanding the limitation period in section 800.

B. Sufficiency of Evidence Supporting Timeliness of Prosecution

Renderos attacks the sufficiency of the evidence to support the jury's true findings of the section 803(g) allegations, arguing the prosecution failed to prove the corpus delicti of section 803(g),[7] and therefore he was deprived of due process of law under the Fifth and Fourteenth amendments of the federal constitution. He relies upon the rule the corpus delicti of a criminal offense must be established independent of the extrajudicial statements of a defendant. Based upon this premise, he argues the People improperly ' relied exclusively upon his extrajudicial statements as corroboration of Ryan's allegations and failed to present any other "independent evidence" of corroboration. We conclude the corpus delicti rule does not apply to the factual allegations in section 803(g), and therefore, the People did not have to produce any corroborating evidence "independent" of Renderos's extrajudicial statements. Consequently, Renderos was not deprived of due process of law.

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[7] Section 803(g) applies only if "[t]he crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.66, excluding masturbation that is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegations. No evidence may be used to corroborate the victim's allegations that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals." (§ 803, subd. (g)(2)(B).)

"The corpus delicti of a crime consists of two elements, the fact of the injury, loss or harm, and the existence of a criminal agency as its cause. [Citation]. It must be proved independently of the extrajudicial statements of the defendant. [Citation.]" (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1175.) "[T]he corpus delicti rule is designed to provide independent evidence that the crime occurred, not help to determine whether the statement was made. Its principle reason is to ensure 'that the accused is not admitting to a crime that never occurred.' (*People v. Jennings* (1991) 53 Cal.3d 334, 368 [ ]; see *People v. Manson* (1977) 71 Ca1.App.3d 1, 42 [][The rule 'guard[s] against a defendant confessing to a crime which was never committed.'].)" (*People v. Carpenter* (1997) 15 Ca1.4th 312, 394 (Carpenter).)

11

Contrary to Renderos's contentions, the issue of whether the jury could convict him based upon his extrajudicial statements in the absence of proof a crime had been committed is separate from the issue of whether the prosecution was timely under section 803(g) (which required a jury fmding that there was independent evidence clearly and convincingly corroborating Ryan's allegations). None of the cases cited by Renderos abrogates the statement in *People v. McGill* (1935) 10 Cal.App.2d 155, 159, that "the facts which prove the existence of the corpus delicti are entirely distinct and separate from those by which the liability of the defendant to be prosecuted for the commission of the crime are sought to be established; and that, although the right to maintain the action is an essential element in the final power to pronounce judgment, that element constitutes no part of the crime itself." (See, also, *People v. Crosby* (1962) 58 Cal.2d 713, 723-724, citing to *People v. McGill, supra*, 10 Cal.App.2d at p. 159; *People v. Chadd* (1981) 28 Cal.3d 739, 758 (*Chadd*), citing to *People v. Crosby*, 58 Cal.2d at p. 723.) The trial court here instructed the jury

that as to each offense of which they had found Renderos guilty, they then had to determine whether the prosecution of the offense had been timely commenced, which included finding there was clear and convincing independent evidence corroborating Ryan's allegations. Consequently, "[b]efore reaching the issue of [the statute of limitations], . . . the jury. .. not only determine[] that a crime ha[d] occurred, but that [Renderos was] the perpetrator. The danger of a conviction when there was no crime cannot arise in this context." (*People v. Hamilton, supra*, 48 Cal.3d at p. 1176.)

There is no merit to Renderos's further argument the Legislature's use of the words "independent evidence" in section 803(g) means that language has the same meaning as used in the "corpus delicti rule," in that there had to be some evidence of corroboration of Ryan's allegations apart from Renderos's extrajudicial statements. The words "independent evidence" do not have any special meaning. Rather, any reference to "independent evidence" in section 803(g) must be read in context. In requiring independent evidence corroborating the victim's allegations, the Legislature meant evidence in addition to the victim's allegations. That in this case the corroborating

evidence happened to be Renderos's extrajudicial statements does not impose an additional evidentiary requirement. The Legislature placed only two limitations on the corroborating evidence: "No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals." Here, without defense objection, the trial court properly admitted Renderos's extrajudicial statements. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1172.) Whether those statements would be sufficient to convict Renderos absent proof of a crime does not render the statements "otherwise

inadmissible during trial." In determining whether Renderos's extrajudicial statements corroborated Ryan's testimony, the jury was merely required to determine whether Renderos made the statements, and if so, whether such evidence "clearly and convincingly" proved Ryan was telling the truth. Renderos's extrajudicial statements did not have to be otherwise independently proved for the purpose of corroborating Ryan's allegations.

We also reject Renderos's contention his telephone statements were used by the jury as propensity evidence for some of the offenses of which Renderos was convicted. He contends that because he made no references during the telephone conversations to sodomy, digital penetration, or specific instances of masturbation, and did not corroborate the time period of the abuse, the jury must have used the telephone statements as propensity evidence, finding that because some of the offenses were specifically corroborated by his telephone statements, that was sufficient to corroborate all the charged offenses. However, section 803(g) does not set forth any minimal criteria in terms of quality or quantity of evidence which is required to meet the clear and convincing standard of corroborative evidence of the victim's allegations. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 403.) In recent appellate decisions, the courts have ruled a victim's allegations against the defendant can be corroborated solely by evidence of similar sex offenses committed against other victims. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 659 ["[n]othing in section 803, subdivision (g), precludes the People from proving the corroboration requirement solely with evidence of a similar offense committed against an uncharged victim"]; *People v. Yovanov, supra*, 69 Cal.App.4th at

p. 404 [evidence defendant committed uncharged sexual misconduct

against another victim can be used to corroborate victim's allegation of sexual abuse under section 803(g)].) "[T]he precise probative value to be accorded to [the corroborative evidence of similar sexual misconduct] will depend on various considerations, such as the frequency of the [other] acts and their similarity and temporal proximity to the charged acts." [Citation.]" (*People v. Yovanov, supra*, 69 Cal.App.4th at p. 404.) In this case, Renderos's telephone statements, standing alone, were sufficient corroboration to support the true findings on the section 803(g) allegations. The jury could reasonably find all the sexual offenses were so significantly similar in nature to each other and occurred in such'- - close temporal proximity to each other that Renderos's telephone statements (consisting of either admissions or adoptive admissions of some acts of lewdness, masturbation, and oral copulation) clearly and convincingly corroborated Ryan's testimony regarding all the acts of abuse.

C. Instructions on Statute of Limitations

Renderos raises a number of objections to the trial court's jury instructions concerning section 803(g), claiming the errors deprived him of due process. None of the contentions warrants reversal.

The trial court initially instructed the jury it should first consider whether Renderos was guilty of each offense by proof showing beyond a reasonable doubt he committed the designated elements of the offenses. The court then instructed the jury on the statute of limitations using the following special instruction provided by the People: "Counts One through Twenty-seven were filed pursuant to Penal Code Section 803(g), which extends the normally applicable statute of limitations under specific circumstances. [¶] The People have the burden of proving the following factual allegations in order for Penal Code section 803(g) to apply. [¶] If you find that the defendant is guilty beyond a reasonable doubt of any of the counts filed pursuant

to Penal Code section 803(g) you must further determine as to each count in which you find guilt whether the People have proved the following factual allegations: [¶] 1. On March 19, 2001, the victim reported to a California law enforcement agency that he, while under the age of 18, was a victim of

[enumerated sexual offenses]. [¶] 2. A complaint accusing the defendant of the crimes was filed on April 25, 2001. [¶] 3. The crimes involved substantial sexual conduct .... [¶] 4. The normally applicable six year statute of limitations for the crimes alleged in Counts 1-27 ... expired before the complaint in this case was filed. [¶] 5. There is independent evidence that clearly and convincingly corroborates the victim's allegation, not including the opinion of a mental health professional. Clear and convincing evidence of the corroboration means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by preponderance of the evidence. You should consider all of the evidence bearing upon every issue regardless of who produced it. Corroborating evidence is evidence which tends to connect the defendant with the commission of the crime. [¶] The People have the burden of proving the truth of the Penal Code section 803 subdivision (g) allegations by a preponderance of the evidence. [¶] ...[¶] If you find the People have not proved the truth of the Penal Code section 803 subdivision (g) allegations by a preponderance of the evidence, you must find the allegations not true. [¶]There is a special finding on the section 803, subdivision (g) allegations included on the verdict form(s) as to Counts 127."

Renderos initially argues the trial court erred by instructing the jury it

should determine whether he was guilty of the charged offenses before determining whether the prosecution was timely.[8] We disagree. The trial court's instruction directed the jury to make specific factual fmdings on the issues of Renderos's commission of the enumerated elements of the offenses and the statute of limitations, rather than return a general verdict of "guilty or not guilty" on all issues. The special instruction was consistent with the Supreme Court's admonition in *People v. Zamora* (1976) 18 Cal.3d 538, 565, footnote

27, that because the People bear the burden of proving the prosecution is timely by a preponderance of the evidence, "when a limitation issue goes to the jury the preferable practice should be to carefully instruct the jury as to that burden making it clear the lesser burden applies solely to the limitation issue. (See *People v. McGill, supra*, 10 Cal.App.2d 155, 159-160.)"

Contrary to Renderos's further contention, the special instruction did not contradict the established procedure set forth in the standard CALJIC instructions on the statute of limitations. Renderos cites to CALJIC Nos. 4.70 and 4.73 in support of his argument the trial court was required to instruct the jury they had to find the prosecution timely in order to find the defendant guilty. However, CALJIC No. 4.70 concerns the situation where the timeliness of the prosecution is governed by the date the crime was committed, and CALJIC No. 4.73 concerns the situation where a defendant is absent from the state following the commission of a crime and the instruction makes no

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[8] Although Renderos did not object at trial to the instruction on this basis, because his "claim ... is that the instruction is not 'correct in law,' and that it violated his right to due process of law[,] the claim ... is not of the type that must be preserved by objection. [Citations.]" (*People v. Smithey* (1999) 20 Ca1.4th 936, 976-977, fn. 7; italics in original.)

reference to the standard by which the People must prove the defendant was absent from the state. Unlike the situations covered by CALJIC Nos. 4.70 and 4.73, the determination that was required to be made by the jury in this case is most like the one a jury must make in the statute of limitations situation where the discovery rule applies. When the latter situation applies, CALJIC No. 4.74 provides that the court is to instruct the jury it may convict the defendant only if the crime was discovered within a specified number of years of the commencement of the prosecution. The instruction concludes with the following sentence: "Even though the People must prove that the defendant is guilty beyond a reasonable doubt, the People must only prove by a preponderance of the evidence that the [crime] was discovered... within [a certain number of] years of the commencement of the action." (CALJIC No. 4.74; italics added.) Similarly, in this case, the trial court's special instruction, which separated the jury findings on the elements of the offenses from the jury findings on the statute of limitations issue, allowed the jury to consider the issue of Renderos's commission of the offenses that had to be established by proof beyond a reasonable doubt without confusing their findings based upon the lesser burden of proof relating to the timeliness of the prosecution. At no time was the jury instructed their

findings as to the elements of the offenses were determinative of their findings regarding the statute of limitations allegations. The special instruction merely told the jury how to apply the People's different burdens of proof. (*People v. Reliford* (2003) 29 Ca1.4th 1007, 1016 [recognizing jurors are often asked to apply different standards of proof to findings in a criminal trial, citing to CALJIC No. 4.74].) Renderos additionally argues the trial court improperly instructed the jury that the People's burden of proof on the factual allegations under section 803(g) was by a preponderance of the evidence, and not the

higher burden of proof beyond a reasonable doubt.[9] Renderos's argument is based upon the premise that because a defendant bee be convicted of an offense that is time-barred, the statute of limitations is an "element of the offense" that needs to be proved beyond a reasonable doubt. Concededly, the courts have described the statute of limitations as part of the People's case to plead and prove as any other "element" of the offense. (See, e.g.., *People v. Le* (2000) 82 Cal.App.4th 1352, 1360.) However, our Supreme Court has consistently held the prosecution is required to prove any factual allegations regarding the statute of limitations only by a preponderance of the evidence in the absence of any other standard set by the Legislature. (*People v. Reliford, supra*, 29 Cal.4th at p. 1016; *People v. Frazer, supra*, 21 Ca1.4th at pp. 760-761, fn. 22; *People v. Zamora, supra*, 18 Cal.3d at p. 565, fn. 27.)

We reject Renderos's contention that prevailing federal constitutional law concerning the burden of proof in criminal cases requires us to now declare the factual allegations concerning the statute of limitations should be deemed an element of the offense that must be established beyond a reasonable doubt. "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (*Patterson v. New York* (1977) 432 U.S. 197, 210.) In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 490, the United States Supreme Court also held the federal constitution requires the prosecution to prove beyond a reasonable doubt any fact, other than a prior conviction,

that increases the maximum punishment for the offense. However, no

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[9] 'See footnote 8, ante.

United States Supreme Court or lower federal court case holds, as a matter of federal constitutional law, that the timeliness of a criminal prosecution must be proved beyond a reasonable doubt. Renderos's reliance on *Grunewald v. United States* (1957) 353 U.S. 391, 398 (Grunewald), and its progeny is misplaced. As conceded by Renderos, Grunewald does not expressly state the statute of limitations applicable for the crime of conspiracy needs to be proved beyond a reasonable doubt. Further, the Grunewald court was not concerned with the trial court's instruction to the jury regarding the standard of proof by which the People had to establish the timeliness of the prosecution. To the extent the trial court Grunewald instructed the jury the defendant could not be found guilty unless the jury found beyond a reasonable doubt both an agreement and one overt act within the applicable statute of limitations, it is only because the commission of the overt act coincided with the completion of the crime of conspiracy, which started the time running to prosecute the case, that such an instruction was proper. Here, however, the offenses were completed during the time period of May 1992 through mid-September 1994, but the time within which to commence the prosecution was extended by operation of section 803(g). Therefore, the timeliness of the prosecution is not governed by the completion of "elements of the offense," as in a conspiracy prosecution, but rather by acts subsequent to the commission of the offenses, namely, the filing of an accusatory pleading within one year of the victim's report to a law enforcement agency.

Finally, there is no merit to Renderos's contention the trial court erred in instructing the jury on the definition of "clear and convincing evidence." The trial court defined "clear and convincing evidence" using the language in BAR No. 2.62. Renderos argues the trial court should have instructed the jury, as he had requested, using the following language: "'"The phrase 'clear and convincing evidence' has been defined as 'clear, explicit, and unequivocal,' 'so clear as to leave

no substantial doubt,' and 'sufficiently strong to demand the unhesitating assent of every reasonable mind.' " [Citation.]' [Citation.]" (*People v. Martin* (1970) 2 Cal.3d 822, 833, fn. 14, quoting from *People v. Caruso* (1968) 68 Cal.2d, 183, 190, disapproved on other grounds in *People v.*

Chojnacky (1973) 8 Cal.3d 759, 764.) However, the trial court was not required to use the language requested by Renderos. (People v Mabini, supra, 92 Cal.App.4th at p. 661.) "The key element of clear and convincing evidence is that it must establish a high probability of the existence of the disputed fact, greater than proof by a preponderance of the evidence." (Id. at pp. 655-656.) The language in BAR No. 2.62 was a correct statement of the law. (*In re Angelia P.* (1981) 28 Cal.3d 908, 919; see *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [citing with apparent approval *In re Angelia P., supra*, 28 Cal.3d at page 919 and BAR No. 2.62].)

Consequently, because no additional language was required regarding the definition of "clear and convincing evidence," the trial court's refusal to expand the definition does not constitute error. [10]

II. Continuous Sex Abuse Conviction

Renderos was convicted of violating section 288.5, which provides, in

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[10] 10 We note the language used by the trial court in defining clear and convincing evidence is consistent with CACI 201 (1st ed. 2003), the recently approved civil jury instruction, which directs the trial court to instruct the jury that in making its fmding a party has met his or her burden of proof by clear and convincing evidence, "the party must persuade [the jury] that it is highly probable that the fact is true." (See Sources and Authority note for CACI No. 201 (1st ed. 2003), citing to I*n re Angelia P., supra,* 28 Cal.3d at p. 919.)

relevant part: "(a) Any person who ... has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense ... or three or more acts of lewd or lascivious conduct ... with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child.... [¶] (b) To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number."

He now argues the People failed to prove three acts of substantial sexual conduct or lewd conduct occurred within the four-month period from May 1, 1992 through

September 18, 1993, when Ryan was eight years old, as charged in count 1 of the second amended information. We disagree.

In viewing the evidence in a light most favorable to upholding the verdict, as we must, the jury could have reasonably found based upon Ryan's testimony that more than three incidents of sexual abuse took place when he was eight years old during the four month period covered by count 1. The necessary three acts occurred during the first and second incidents when Ryan was eight years old. (People v. Scott (1994) 9 Ca1.4th 331, 344, fn. 6 (Scott) ["multiple sex acts committed on a single occasion can result in multiple statutory violations"].) Relying upon the reasoning in *People v. Bevan* (1989) 208 Cal.App.3d 393, 399-403 (Bevan) and *People v. Bothuel* (1988) 205 Cal.App.3d 5811, 589-592 (Bothuel), Renderos argues the two acts that occurred during the second incident (Renderos touching Ryan's penis and then forcing Ryan to masturbate him) constitute only one act. However, the

Supreme Court in Scott specifically found the reasoning in Bevan and Bothuel to be "flawed." (*Scott, supra*, 9 Ca1.4th at p. 347.) "Bevan and Bothuel do not properly analyze the circumstances under which a defendant may be separately convicted ... for separate lewd acts committed in a single encounter. They are disapproved to this extent." (Id. at pp. 347-348.) In any event, the jury could have found a third incident occurred before Ryan turned nine based upon his testimony the sexual abuse continued on a more frequent basis as he got closer to nine, with the third incident happening "a little bit after" the second incident, and then on an almost nightly basis, "at least once every three days." Ryan additionally testified from the time the sexual activity started (when he was eight) until the time it ended, it occurred each month during that period of time; and once the molestation started, there were never any months when Renderos did not molest him. In support of his argument a third incident did not occur when Ryan was still eight, Renderos cites to isolated portions of Ryan's testimony: Ryan's testimony he could not recall how many times the molestation happened while he was still eight years old, and when Ryan was asked, "But you say it was like nearly every night that your mom left?", he replied: "That got more into when I was about nine years old." However, as noted, the testimony relied upon by Renderos is not the extent of

Ryan's testimony regarding the third incident or the continuous nature of the abuse he suffered shortly after the second incident, from which the jury could reasonably conclude three acts of substantial sex abuse took place over the four months in question.

III. Oral Copulation Conviction

Renderos was found guilty of committing the crime of unlawful oral

copulation in violation of section 288a, subdivision (c) (section 288a(c)), by participating in an act of oral copulation (between September 19, 1992 and September 18, 1994) when he was 10 years older than Ryan, who was then under the age of 14 years. At the time of the commission of the offense, former section 288a(c) read: "Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat shall be punished by imprisonment in the state prison for three, six, or eight years." (Italics added.)

Renderos argues his conviction for oral copulation is barred under the ex post facto clauses of the state and federal constitutions. His contention is based upon the assumption that under the law as it existed at the time of the commission of the offense, former section 288a(c) required the People to plead and prove not only the age difference between the defendant and victim but also such offense was committed by force and violence. Consequently, he argues that because the current section 288a(c), as charged under count four of the second amended information, eliminates the force and violence elements of its predecessor, it lessened the amount of evidence needed to convict him of that offense, thereby contravening ex post facto principles. We disagree.

Renderos's contentions are based upon an incorrect premise. Under both the predecessor and current versions of section 288a(c), the People can prosecute a charge of oral copulation based solely upon the age difference between the victim and the

defendant. In the former statute, the use of the disjunctive "or" between the various means by which a defendant could commit the criminal offense of oral copulation permitted a conviction based solely on the age difference between the defendant and the victim, like the current statute. As noted by the People, in 1998, subdivision (c) of section 288a was rewritten merely to clarify the various means of committing criminal oral copulation by separating each theory into its own paragraph; there was no intent to change the substantive nature of the offense.[11] (Stats. 1998, c. 936, § 25 ["The amendment[] to section 288a ... which number certain subdivisions with paragraphs, [is] intended to be [a] technical amendment[ ] only and [is] not intended to make any substantive changes in th[at] section[]"].) Thus, there is no merit to Renderos's claim his conviction for oral copulation was barred by any change in the law ex post facto.

IV. Admission of Other Crimes Evidence

Renderos challenges the admission into evidence of a portion of the

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[11] 11 Section 288a(c) currently reads: "(c)(1) Any person who participates in an act of oralcopulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] (2) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years. [¶] (3) Any person who commits an act of oral copulation- where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years."

tape of the telephone calls between himself and Ryan, which is transcribed on page 13 of the tape's transcript, and is set out in the margin of this opinion.[12] In this part of the conversation, Renderos asked Ryan to "fix him up" with a "ho" (slang for prostitute) age 18 or younger. Overruling defense counsel's objections that the evidence was irrelevant and highly prejudicial, the trial court stated: "[I]n reading so far the areas of objection, especially page thirteen, I think it goes far to describe the relationship between the alleged victim and the defendant. And I think that is relevant to the charges."

Renderos now argues he was deprived of due process by the admission of the challenged evidence because its only relevance was to show his propensity to commit crimes (solicitation of prostitution and statutory rape) with underage persons and in the absence of an instruction not to consider the evidence as tending to prove propensity, the jury might well have mistaken this evidence as "corroboration" of the charged offenses. Initially, we note that in seeking to exclude this portion of

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[12] The relevant part of the transcript reads as follows:

"A. [Renderos]: Hey, do you know any -- any ho's Man? Fix me up.
Q. [Ryan]: No, I don't know no ho's.
A. Fix me up, Man.
Q. I'll see what I can do.
A. Fix me up.
Q. I'll see what I can do.
A. Something nice and about 18, you know?
Q. Yeah.
A. I can, you know, legal.
Q. You don't want 'em younger, maybe?
A. Well, I don't know. Am I -- Oh, you know? Never know.
Q. All right....
A. See what you can do, Man.
Q. All right.
A. You know I like my pussy, Bubba.
Q. All right.
A. Whenever you want to talk. Whenever you have problems, call me, Man. Call me."

the transcript, appellant did not raise any "propensity" argument nor did he request the trial court to caution the jury on the use of the evidence. (See *People v. Bolin* (1998) 18 Cal.4th 297, 327-328 [trial court has no *sua sponte* duty to instruct the jury as to use of other crimes evidence].) In any event, we need not address whether the trial court should have allowed into evidence the challenged part of the tape. Assuming for the sake of argument the trial court should have excluded the challenged evidence, the error was harmless beyond a reasonable doubt. The prejudicial effect of the evidence was minimal given that it "was no stronger and no more inflammatory than the [evidence] concerning the charged offenses." (*People v. Ewoldt* (1994) 7 Ca1.4th 380, 405.) It is unlikely "the jury might [have] doubted that [Renderos] committed the charged offenses but convict[ed] anyway because of a belief he committed [any] uncharged crimes. [Citation.]" (Carpenter, supra, 15 Ca1.4th at p. 3$4-)-- -' Accordingly, reversal on this basis is not warranted.

V. Prosecutorial Misconduct

Renderos argues on appeal his conviction should be reversed because the trial prosecutor failed to prevent Ryan's mother, Lisa, from testifying on cross-examination both her sons had been molested,[13]

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[13] The transcript of Lisa's testimony during cross-examination, in context, with the challenged portion italicized, reads as follows:

"Q.... [W]hat kind of relationship did you have with your son, Ryan? "A. What kind of relationship did I have with my son, Ryan? "Q. During the time period '92 to '96?

"A. Ryan had some signs of dysfunction. There was no doubt. He had some anger issues. I took Ryan to psychologists. I took him to psychiatrists. Urn, from the period of six grade to the present he's been in about eight different schools. I have met with special education.... I didn't know what the problem was with

and the prosecutor did not disavow Lisa's testimony (which had been stricken), but instead referred to it during her closing statement to the jury, when she argued: "I think what you saw from [Lisa] was some really righteous emotion on the witness stand. She was upset ....['fl What she said, you know, was emotional. I don't think you can read that to say she was somehow making these things up to help the case along ....[¶] When we are talking about, you know, credibility, you

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Ryan ....[¶J He's never been in trouble outside of our home. Everything has always been centered from our home. He would get angry, punch a door, hit the wall, things like this. I didn't know why.

"Q. You are saying this all occurred approximately around 1992?

"A. No, it started a little later ....[¶] It started later.

"Q. It's fair to say this type of behavior was never present in Ryan before?
"A. No.

"Q. 1992?

"A. No, both of my boys, and I say both of my boys have had problems, both my boys have been molested

[Defense Counsel]: Objection, move to strike, your Honor.

The Court: Sustained

[Defense Counsel]: Nonresponsive.

The Court: The jury will disregard the last sentence, please.

[Lisa]: Don't shake your head like that. Don't do it.

The Court: Ms. C[J, there is no question before you, please. "

The transcript does not indicate to whom Lisa is directing her remark regarding the shaking of a head. Renderos claims Lisa was "possibly directing her remark to [him]" and the People "recognize" the remark was likely directed at Renderos.

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can look at the witness's demeanor while they are testifying. You can look at Lisa. .., what she did, what she said, her emotions." There is no merit to Renderos's contentions regarding the prosecutor's conduct. The record does not contain any evidence the prosecutor knew or should have known Lisa was going to mention both her sons had been molested. Moreover, the trial court directed the jury to disregard the testimony, and we assume the jury followed that instruction. *(People v. Sanchez* (2001) 26 Ca1.4th 834, 852.) Further, Renderos did not object or request any cautionary instruction regarding either Lisa's conduct or the prosecutor's references to the emotional nature of Lisa's conduct on the witness stand. In any event, to the extent any of the challenged comments were erroneous or inappropriate, it is not reasonably probable a different result would have been reached in the absence of those remarks. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

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VI. Instruction on Circumstantial Evidence

Without objection, the trial court instructed the jury on the meaning of circumstantial and direct evidence, and the meaning of "inference," as follows: "Evidence is either direct or circumstantial. [¶] Direct evidence is evidence that directly proves a fact. It is evidence which by itself if found to be true establishes the fact. [¶] Circumstantial evidence is evidence that if found to be true proves a fact from which an inference of the existence of another fact may be drawn. [¶] An 'inference' is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [¶] Direct evidence often times is considered eye witness evidence. Somebody that has seen an act and describes it in court. [¶]

Circumstantial evidence, I'll give you an example. Let's assume this is a case where a person is accused of breaking into a jewelry store. And the facts are that somebody broke the glass in the jewelry store in front of the store, grabbed some jewelry and ran. No one saw those acts, but a person is caught within a block or two of the store, and in the cuffs of the pants of the individual, they find broken glass that matches the glass that was broken from the front of the store. Also that he's in possession of jewelry that is identified from being taken from that store. The fact there is glass in the cuffs of the individual, and the fact that he was in possession of jewelry is circumstantial evidence tending to prove guilt. That's kind of an example of what direct and circumstantial evidence is. [¶] It is not necessary the facts be proved by direct evidence. They may be proved also by circumstantial evidence or a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other."

Renderos now challenges the italicized language of trial court's instruction, arguing that "this one-sided example suggested to the jury that circumstantial evidence is always highly probative of guilt, giving a false significance to such evidence." He further argues that although the prosecution's evidence in support of the charges was primarily Ryan's direct testimony he had been sexually abused, the "corroborating" evidence required under section 803(g) was almost entirely circumstantial, consisting of

Renderos's telephone statements. Accordingly, Renderos argues even if the court had not given the challenged example, the court should have instructed sua sponte using the language in CALJIC No. 2.01, which, in pertinent part, informs the jury circumstantial evidence is no more probative than any other evidence and should be evaluated

carefully. Renderos concludes by arguing: "Having given the argumentative example, it was incumbent upon the trial court to correct any false impression the jury might have gotten by giving CALJIC No. 2.01."

Initially, we note Renderos waived his right to appellate review of the jury instructions on the issue of circumstantial evidence by failing to object to the instruction or requesting clarification of the instruction at the trial level. (*People v. Rodrigues*, 8 Ca1.4th 1060, 1193.) In any event, he has failed to show how the instruction affected his fundamental rights. The correctness of jury instructions is determined from the entire instructions given by the court and not from isolated parts of the instructions. (*People v. Smithey, supra*, 20 Ca1.4th at p. 964.) The example of circumstantial evidence did not suggest to the jury that circumstantial evidence is always highly probative of guilt," as argued by Renderos. Consequently, the trial court was not required to correct any misimpression by instructing the jury using the language in CALJIC No. 2.01. The trial court was not otherwise under any duty to instruct the jury using the language in CALJIC No. 2.01 on its own initiative. (See *People v. Wiley* (1976) 18 Cal.3d 162, 174 [defendant's "[e]xtrajudicial admissions, although hearsay, are not the type of indirect evidence as to which the instructions on circumstantial evidence [under CALJIC No. 2.01] are applicable"]; *People v. Williams* (1984) 162 Cal.App.3d 869, 874-876 [CALJIC No. 2.01 need not be given sua sponte when the circumstantial evidence merely corroborates other evidence].)

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VII. Instruction on Renderos's Statements

Without objection, the trial court instructed the jury on its consideration of Renderos's statements using only the first two

sentences in CALJIC No. 2.71, as follows: "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the result of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part." The court did not use the third sentence of CALJIC No. 2.71, which would have instructed the jury that "[e]vidence of l an oral admission of [a] [the] defendant not made in court should be viewed with caution" (cautionary instruction). [14]

Renderos now argues the trial court committed prejudicial error by failing to give the cautionary instruction sua sponte. He concedes the trial court was not required to instruct the jury to view with caution his telephone statements, which were recorded by the police. *(People v. Mayfield* (1997) 14 Ca1.4th 668, 776.) However, he contends the cautionary instruction was required regarding Ryan's testimony as to the following statements: (1) (during the Russian River incident) Renderos told Ryan to leave his (Ryan's) hand on Renderos's penis; (2) (during a discussion between Ryan and Renderos prompted by Ryan asking Renderos if he had ever been in jail) Renderos stated, "there are consequences for everything"; and (3) (months after the Russian River incident) Renderos told Ryan not to talk about their sexual encounters; Renderos said he (Renderos) would get in trouble, and Ryan should not discuss the matter with his mother.

Our Supreme Court has held that regardless of whether a defendant's out of court statement is technically an "admission" under traditional

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[14] Because the trial court only instructed the jury using the language in CALJIC No. 2.71, we assume Renderos's citation to CALJIC No. 2.70 is a typographical error and his argument is directed to the use of CALJIC No. 2.71.

rules of evidence, the trial court has a sua sponte duty to give the cautionary instruction after admitting into evidence "any oral statement of the defendant, whether made before, during, or after the crime."

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(*Carpenter, supra*, 15 Cal.4th at p. 393.)[15] However, even though the cautionary instruction should have been given here, reversal is not warranted.

"We apply the normal standard of review for state law error; whether it is reasonably probable the jury would have reached a result more favorable to [Renderos] had the instruction been given. [Citations.]" (*Carpenter, supra*, 15 Cal.4th at p. 393.) Citing to *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, Renderos argues that where a violation of state law also violates federal due process, the more stringent standard for federal constitutional error is mandated. "He is wrong. Mere instructional error under state law regarding how the jury should

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[15] 15 The People's argument that a cautionary instruction was not warranted because the challenged statements here were either part of the crime itself or facilitated the crimes confuses the requirement of instructing the jury to view evidence of a defendant's out of court statements "with caution" (cautionary instruction) with the requirement of instructing the jury the corpusdelicti of a crime must be proved independently of a defendant's admission or confession (the corpus delicti instruction). The Carpenter court expressly distinguished the trial court's need to give the cautionary instruction (ruling such an instruction is to be given regarding "any oral statement of the defendant, whether made before, during, or after the crime" (15 Cal.4th atp. 393)) from the corpus delicit instruction (ruling such an instruction only applied to preoffense - statements of later intent and postoffense statements, but it "d[id] not apply to a statement that is part of the crime itself"). (Id. at p. 394.) Thus, while Ryan's testimony regarding Renderos's out of court oral statements did not have to be independently proved, the trial court should have instructed the jury to view Ryan's testimony regarding those statements with caution.

consider evidence does not violate the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [].) Failure to, give the cautionary instruction is not one of the '"very narrow[]" ' categories of error that make the trial fundamentally unfair. (Id. at p. 73 [].)" (*Carpenter, supra*, 15 Cal.4th at p. 393.) "Omission of [CALJIC No. 2.71] does not constitute reversible error in every instance. Reversal is justified only if upon a reweighing of the evidence it appears reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. [Citation.] The circumstances of each case must be examined to determine whether a failure to give cautionary instructions constitutes reversible error. [Citation.]" (*People v. Lopez* (1975) 47 Cal.App.3d 8, 13.)

As noted, defendant did not object to the trial court's failure to instruct the jury it should view Renderos's out of court admissions with caution. "This circumstance does

not obviate the court's sua sponte duty, but may be considered in determining prejudice." (*Carpenter, supra*, 15 Cal.4th at p. 393.) "Moreover, the court fully instructed the jury .on judging the credibility of a witness, thus providing guidance on how to determine whether to credit [Ryan's] testimony." (Ibid.) Finally, this case is factually distinguishable from the circumstances in *People v. Deloney* (1953) 41 Cal.2d 832, 840 (*Deloney*) and *People v. Ford* (1964) 60 Cal.2d 772, 799 (*Ford*), cited by Renderos. In those cases, the defendants' statements subject to the cautionary instruction "constituted a substantial part of evidence offered to establish the prosecution's case." (*Ford, supra*, 60 Cal.2d at pp. 799-800; see *Deloney, supra*, 41 Cal.2d at p. 840.) Here, the statements at issue were not vitally important evidence. Given the nature of Renderos's telephone statements, which were not subject to the cautionary

instruction, we cannot say the verdict would have been different had the jury been told to view with caution Renderos's other extrajudicial statements. (*People v. Watson, supra*, 46 Cal.2d at p. 835.)

VIII. Sentencing Errors

The trial court sentenced Renderos to the aggravated base term of 16 years in prison for his conviction for continuous sexual abuse, and imposed consecutive sentences of two years (one-third the middle term) for each of the remaining 25 convictions, for a total term of 66 years.

Renderos argues he is entitled to be resentenced before a different judge because the court supported its sentencing choices by using elements of the crimes as aggravating factors, by relying upon factors not supported by the trial evidence, and the court did not consider obvious mitigating factors. However, having failed to object to the court's statements at the time of sentencing, Renderos waived any challenge to his sentence on these grounds. (*Scott, supra*, 9 Cal.4th at pp. 353-356.) In any event, a new sentencing hearing is not mandated. In its discretion, the trial court may rely upon one single valid aggravating factor and reject all mitigating factors. (*People v. Osband* (1996) 13 Ca1.4th 622, 728-729; *People v. Forster* (1994) 29 Ca1.App.4th 1746, 1758.) Here, in imposing the "high term of sixteen years in state prison" on the conviction for continuous sexual abuse under section 288.5, the trial court relied upon the valid aggravating circumstance

that Renderos had taken "advantage of a position of trust" that enabled him to commit the sex offenses against Ryan. (See Cal. Rules of Court, rules 4.421(a)(11); *People v. Burbine* (2003) 106

Ca1.App.4th 1250, 1263 ["breach of position of trust" is not an element of continuous sexual abuse under section 288.5, and therefore it is properly considered an aggravating factor]; *People v. Clark* (1992) 12 Ca1.App.4th 663, 666 [same].) In imposing consecutive terms, the court relied upon the additional valid factors that each crime was predominantly independent of each other and the crimes were committed at separate times, "occurr[ing] over a two-and a half year period," rather than being committed so closely in time as to indicate a single period of aberrant behavior..." (See Cal. Rules of Court, rule 4.425(a)(1), (3).) Because valid criteria justified the trial court's sentencing decisions, we are reasonably certain any other comments or factors relied upon by the court were not determinative of its decision.[16] Were we to remand the matter, the trial court would merely omit any reference to the challenged comments or factors, and would properly reach the same result. (See *People v. Osband, supra*, 13 Ca1.4th at pp. 728-729.)

IX. Habeas Corpus Petition

"A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]" *(In re Visciotti* (1996) 14 Ca1.4th 325, 351.) If the petitioner does not state a prima facie case for relief, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an order to show cause. (*People v. Duvall* (1995) 9 Ca1.4th 464, 474-475.) The facts alleged by Renderos regarding his trial counsel's conduct do not, in our view, establish a prima facie case for relief.

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[16] Consequently, we need not address Renderos's contention the trial court improperly stated at one point during its comments there were no mitigating circumstances. 32

A. Trial Counsel's Failure to Challenge The Accusatory Pleadings

The prosecutor filed a complaint on April 25, 2001, charging Renderos, in relevant part, with committing 27 felony sex offenses between May 1, 1992 and September 19, 1994. On its face, the complaint was insufficient because it did not contain factual allegations under section 803(g) that an extension to the six-year statute of limitations under section 800 applied to the offenses. Renderos waived his right to a preliminary examination, and the court deemed the complaint to be the information. The People filed an amended information that included the factual allegations under section 803(g). They later moved to file a second amended information, the operative pleading, which again included the factual allegations under section 803(g). Renderos opposed the filing ,of the second amended information, arguing the section 803(g) allegations should be stricken on the sole ground there was no evidence that clearly and convincingly corroborated Ryan's allegations. Before trial, the trial court granted the People's request to file the second amended information. The court rejected Renderos's contention his telephone statements were too ambiguous to constitute clear and convincing evidence corroborating Ryan 's allegations.

In his petition for habeas corpus, Renderos argues his trial counsel was ineffective because he failed to move to dismiss the information or challenge any amendment to the information on the ground the complaint did not initially include factual allegations under section 803(g). However, his claim of ineffective assistance is premised on the incorrect assumption that because the complaint did not contain any factual allegations under section 803(g), and there was no preliminary hearing at which evidence regarding those allegations was presented,

the People could not later add the factual allegations under section 803(g) to any information.

Section 1009 governs the amendment of criminal pleadings. In relevant part, it currently provides: "The court in which an action is pending may order or permit an amendment of an indictment ... or information ... for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another

grand jury, or a new information to be filed.... An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination." (Ibid.; italics added)[17] Here, the defendant waived his right to a preliminary examination. Thus, the issue is whether the adding of factual allegations under section 803(g) bringing the prosecution within the statute of limitations can be viewed as charging different offenses than those alleged in the original felony complaint (that was deemed the information).

Although neither Renderos nor the People cite to it, *Chadd, supra*, 28 Cal.3d 739, is dispositive of Renderos's contention that the People cannot amend an information to.,..' add factual allegations under section 803(g) where there has been no preliminary hearing. In Chadd, the People filed a complaint charging the defendant with

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[17] Section 1009 was amended in 1998 to accommodate unification of the municipal and superior courts in a county and to make the language gender neutral throughout the section. (Stats. 1998, ch. 931, § 393, eff. Sept. 28, 1998.) The statute was not otherwise changed.

various offenses. (Id. at p. 744.) The defendant waived a preliminary examination and was later arraigned on an information filed on January 25, 1979, alleging, in relevant part, that four and one-half years earlier, on or about July 26, 1974, the defendant had committed a rape, sodomy, burglary and robbery. (Id. at pp. 744, fn. 1, 756.) After the defendant pleaded guilty and was sentenced, he appealed on the ground his convictions for the noted felonies were barred by the applicable three-year statute of limitations. (Id. at p. 756.) The Supreme Court agreed with the defendant that because there were no factual allegations in the information to take the matter within the statute of limitations, his convictions had to be reversed. (Id. at pp. 756-757.) However, the Court specifically rejected the "defendant's further contention that on remand these counts cannot be amended to allege facts tolling the statute (see Pen. Code, § 802)." (Id. at p. 758.) The court stated: "Our reversal of the judgment on these counts, of course, 'remands the cause for new trial and places the parties in the trial court in the same position as if the cause had never been tried.' [Citation.] After entry of plea, an accusatory pleading may be amended with leave of court 'for any defect or insufficiency, at any stage of the proceedings' - including,

therefore, on remand after reversal - provided the amendment does not 'change the offense charged' or otherwise prejudice the substantial rights of the defendant. (§ 1009.) An amendment adding allegations tolling the statute of limitations does not 'change the offense charged' (*People v. Crosby* (1962) ... 58 Cal.2d 713, 723); and there is neither claim nor showing that such amendment would prejudice the substantial rights of this defendant, who has been aware of the charges at all times and indeed testified at length to the factual basis of each in pleading guilty thereto. It follows that on remand the prosecution will be entitled to seek leave to amend the information by adding

appropriate allegations tolling the statute. [Citations.]" (*Chadd, supra*, 28 Cal.3d at p. 758.) So, too, in this case, the People were authorized to seek leave to amend the information by adding appropriate factual allegations bringing the prosecution within the statute of limitations under section 803(g).

Renderos's reliance on *People v. Winters* (1990) 221 Ca1.App.3d 997 (Winters), is misplaced. In that case, the defendant waived a preliminary hearing on the felony complaint and was later charged by an information with possession of methamphetamine for sale, the only offense in the complaint. During the trial, the prosecutor moved to amend the information by adding an additional charge of transportation of methamphetamine. (Ibid.) Over the defendant's objection, the trial court granted the motion and the jury convicted the defendant of both counts. The Fifth District Court of Appeal held the defendant's conviction for transportation of drugs had to be dismissed because "[s]ection 1009 specifically proscribes amending an information to charge an offense not shown by the evidence taken at the preliminary hearing." (Id. at p. 1007.) In this case, however, the People did not seek to add new offenses to those alleged in the felony complaint; the offenses in both the original information and the second amended information were exactly the same as those in the felony complaint. As noted, the added factual allegations under section 803(g) did not change the offenses charged. (*Chadd, supra*, 28 Cal.3d at p. 758.)

Thus, even if Renderos's trial counsel had objected to the information or any amendment to the information on the basis the prosecutor could not add factual

allegations under section 803(g), such a challenge would have be

futile. Under section 1009, the trial court was authorized to grant the prosecutor's request to amend the information by including those allegations. (*Chadd, supra*, 28 Cal.3d at p. 758.) Renderos has not shown the addition of the factual allegations under section 803(g) prejudiced his substantial rights. (See § 960 ["[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits"].) At all times, Renderos was aware of the time periods during which the offenses happened, and he testified at length without alleging he was unable to mount a proper defense. Even if the trial court erred in allowing the amendment, when the statute of limitations issue is tried to a jury, any deficiency in the pleading in that regard no longer matters. (*People v. Williams* (1999) 21 Cal.4th 335, 346 [if the record shows the action is not time-barred, "the conviction will stand despite the prosecution's error in filing an information that appeared time-barred"].)

We therefore conclude Renderos has failed to state a prima facie case for relief based upon a claim that his trial counsel was ineffective for failing to object to any pleading defect.

B. Trial Counsel's Failure to Cross-Examine Witnesses

In his petition for habeas corpus, Renderos also argues his trial counsel was ineffective because counsel had no tactical reason for failing to cross-examine Lisa and Ryan on the following grounds: (1) Renderos had lent money to Lisa, which she did not want to repay to him or (2) Ryan planned to file a civil action for monetary damages if Renderos was convicted. According to Renderos, his trial counsel intended to question the witnesses about their financial motives but he overlooked the issue during crossexamination. Renderos further argues had his counsel so questioned the witnesses, the jury would have learned both

Lisa and Ryan had considerable financial motives to fabricate allegations of molestation.

To establish ineffective assistance of counsel, the defendant "must establish either: (1) As a result of counsel's performance, the prosecution's case was not subjected to

meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown [citations]; or (2) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. [Citations.]" (*In re Visciotti, supra*, 14 Cal.4th at pp. 351-352.) The rule of per se reversal in cases where counsel fails to subject the prosecution's case to adversarial testing is narrowly applied. "Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage." (Id. at p. 353.) Renderos does not contend this case meets that strict standard. He claims only a more favorable outcome was reasonably probable had his counsel not performed ineffectively by failing to cross-examine the witnesses on their financial motives. Ultimately, "'[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (Id. at pp. 351-352, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686; accord, *In re Cudjo* (1999) 20 Cal.4th 673, 687.)

We accept, for the purpose of argument, that defense counsel had no "tactical reason" for not questioning Ryan and Lisa regarding any

financial motives for their testimony, and counsel meant to question the witnesses but he merely forgot. Nevertheless, in determining whether counsel's failure was prejudicial, we evaluate the entire record, not the single error in isolation. Defense counsel did impeach both Ryan and Lisa, noting their recollections of the events in question were contradictory, there was a lack of corroborative physical evidence, and Ryan's trial testimony was contradicted by his earlier statements to the police. To the extent defense counsel could or should have questioned the witnesses about their financial motives for pursuing charges against Renderos, defense counsel's failure to so question the witnesses does not "undermine [our] confidence in the outcome." (*People v. Riel* (2000) 22 Cal.4th 1153, 1175.) The testimony of the witnesses would have helped only if the witnesses admitted Lisa owed a

debt to Renderos that she did not want to repay, and at the time of trial, Ryan was planning to file a civil lawsuit for monetary damages.. However, Lisa was not a percipient witness to any of the acts of sexual molestation and her testimony was not critical to Renderos's convictions. Although Ryan's credibility was central to the case, there was independent evidence that corroborated his allegations, namely, Renderos's telephone statements. Thus, it is highly unlikely a jury would draw such a negative inference from the filing of a civil lawsuit for damages or a dispute over money owed to Renderos that it would have acquitted him. We cannot say the verdict was "rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *Strickland v. Washington, supra*, 466 U.S. at p. 702.) Accordingly, Renderos has not established a prima facie case for relief based upon his trial counsel's failure to question the witnesses about their financial motives for testifying against him.

DISPOSITION

The motion for summary reversal is denied, the judgment is affirmed, and the petition for a writ of habeas corpus is summarily denied.

Parrilli, J.

We concur: McGuiness, P. J. Corrigan, J.

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Case 3:04:cv-05250-CRB Filed 07/07/2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VICTOR MANUEL RENDEROS,	NO C 04-05250 CRB
Petitioner,	MEMORANDUM AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS
v.	
STUART J. RYAN, Warden,	
Respondent	

After a jury trial, Victor Manuel Renderos, was convicted in Alameda County Superior Court of twenty-six counts of various sex offenses involving a minor under the age of fourteen, committed between May 1, 1992 and September 19, 1994. The statute of limitations for the offenses was six years under California Penal Code section 800. Before the six-year period expired for any of the offenses, however, the Legislature enacted section 803(g), which permits the filing of a criminal complaint within one year of the victim's report of the offenses so long as they involve defined substantial sexual conduct against minors and there is independent evidence that clearly and convincingly corroborates the allegations. The jury found that the section 803(g) requirements had been met and the People had timely commenced the prosecution.

Renderos now brings a petition for writ of habeas corpus arguing that with respect to his case California revived the statute of limitations in violation of the Ex Post Facto

Clause of the United States Constitution. Petitioner also argues that the trial court committed several other evidentiary and legal errors that violated his rights to due process and a fair trial. After carefully considering the papers submitted by the parties, the Court hereby DENIES the petition for the reasons stated herein. As applied here, section 803(g) did not revive the limitations period for Renderos's crimes, but instead merely extended it. The statute is therefore not an unconstitutional ex post facto law.

BACKGROUND

The California Court of Appeal summarized the facts of this case as follows:

> In the 1990s, Renderos, then in his early fifties, dated Lisa C., who had two children, Ryan, who was under 14 years old, and his younger brother, Jordan. Renderos spent a lot of time with Lisa and her sons. On an almost daily basis, after he finished work, Renderos went to Lisa's home for dinner and he then spent the evening with Lisa and her sons before he returned to his home. Renderos was also present at holiday dinners and birthdays and he took trips with Lisa and her sons. Ryan thought of Renderos like a father. However, over a two-year period from May 1992 continuing to mid- September 1994, Renderos molested Ryan on numerous occasions. Ryan was eighteen years old at the time of trial. He described in detail the first two incidents that happened when he was eight years old.
>
> The first incident occurred during a family trip to the Russian River. According to Ryan, it was spring but hot enough to go swimming. While Lisa remained on shore, Renderos and Lisa's sons went canoeing and then stopped near some bushes to urinate. Renderos and Ryan were standing at one bush, while Jordan was standing nearby at another bush. After urinating,

Renderos took Ryan's hand, placed it on his (Renderos's) penis, and told Ryan to keep his hand there. Ryan left his hand there for a few seconds and then removed it. Driving home, Ryan rode with Renderos in his truck while Lisa and Jordan rode home in her car. Ryan did not tell anyone about the incident.

The second incident occurred about two months later. Renderos was at Ryan's home for the nightly dinner with the family. After dinner, Ryan's mother left the house to attend to her real estate business. Ryan was in his bedroom changing his clothes when Renderos came in. Renderos reached through the opening in Ryan's boxer shorts, and pulled on Ryan's penis for a few seconds. Renderos then had Ryan place his own hand on Renderos' penis, and "jack [Renderos] off" until he ejaculated. No words were spokenduring this incident. Ryan then got dressed, and he went into another room to watch television. Ryan did not say anything to anyone about the incident.

The sexual abuse, which Ryan described as "touching, the[n] me jacking him off," continued on a more frequent basis as Ryan got closer to nine, with the third incident happening "a little bit after" the second incident, and then on an almost nightly basis, "at least once every three days." Ryan, however, was unable to recall how many times he was molested while he

was still eight years old. But, he testified the abuse occurred from the time he was eight years old . . . "[a]nd it started stopping when [he] was getting close to eleven. When [he] got to eleven, it just stopped." Ryan further testified from the time the sexual activity started until the time it ended, it occurred each month during that period of time; and once the molestation started, there were never any months when

Renderos did not molest him.

In addition to the forced masturbation, Ryan testified he was eight to nine years old when Renderos first used his finger to penetrate Ryan's rectum. When Ryan was nine or ten, on one occasion he was forced to orally copulate Renderos, on a few occasions Renderos used his finger to penetrate Ryan's rectum, and on one occasion Renderos used his penis to penetrate Ryan's rectum.

About one year before the trial, when Ryan was seventeen, his girlfriend confided she had been molested, and in response, Ryan told his girlfriend he too was molested. His girlfriend encouraged Ryan to tell his mother about Renderos' conduct. Ryan testified once he spoke with his mother, "all my problems just stopped almost." Ryan had not previously said anything to his mother about the sexual abuse because he was afraid he would get in trouble and because the incidents made him feel gay. Ryan further testified a few months after the Russian River incident, Renderos told him not to talk about their sexual encounters; Renderos said he (Renderos) would get in trouble and Ryan should not discuss the matter with his mother. According to Detective James Matthews, Jr., Ryan reported he thought Renderos would kill his mother if he said anything about the abuse.

On March 19, 2001, Ryan reported the abuse to the police who recorded a statement from Ryan. One month later on April 20th, at the police station, Detective Matthews had Ryan place two telephone calls to Renderos in which Ryan asked Renderos whether he remembered the molestations and why Renderos had molested him. During the first telephone call, Ryan questioned Renderos about the first incident at Russian River and why Renderos always touched Ryan when he was little.

Renderos at first stated he did not remember the trip or always touching Ryan when he was little. Renderos then stated, "But don't worry about shit like that, Man. That was something that, you know, happened a long time ago and that you—we just did some playing around, you know? . . . No big thing." Ryan prefixed the second telephone call by asking Renderos for counseling on a problem. To which Renderos told Ryan, "Hey, come on over, Man. You know . . . things like that happen—Hey, it was just—you was crazy at the time. You remember that. . . . You know, you were crazy and you want to experiment things, you know and things like that. You're the one that motivated the whole thing, you know? Just let the guilt out of your head." Ryan then stated he was having sexual problems with his girlfriend, to which Renderos replied Ryan should not smoke any dope. Ryan replied he had not used any dope for six or seven months. When Ryan further stated he was bothered by Renderos' act of "always like make me put my hand on your penis . . . ," Renderos replied, "Oh well, you know? You—you wanted to do that. You know remember? You wanted to." When Ryan said he was eight years old, Renderos claimed: "You were about 12, Man. You were old, already. . . . I didn't meet you when you was eight. You were older than that." When Ryan again stated it was not normal for guys to grab each other's dicks, Renderos replied, "Oh, it's a—I know. Yeah, I couldn't figure out why you want to do it. Remember that?" When Ryan said he did

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not really want to do it but Renderos got his hand, Renderos replied, "No, you're . . . the one. You started out, remember, you wanted to experiment crazy things. You . . . were always doing crazy things. Remember that? When Ryan again said he did not understand why Renderos wanted Ryan to try to suck

his dick because it was like Renderos was using Ryan to get what he wanted, Renderos replied, "Oh, no, no, no, no, no. Huh-uh. No, no. You got me wrong. You want to experiment things. You want to fuck around with this. You want to do that. You want to do this. You want to do that. [¶] You're the one that always wanted it. Remember the way you are, Man. The way you used to be. [¶] You want to do this, you want to do that. . . . I didn't force you into doing anything. You're the one that motivated everything. [¶] Think about that." Ryan stated he did not know how he had motivated the sex because he was young, to which Renderos replied, "Well, you knew what you were doing, Bro." The remainder of the telephone conversation, which is set out in the margin of the opinion, continued in the same vein, with Ryan continuing to ask Renderos if he remembered the sexual encounters, and Renderos telling Ryan to forget about the incidents.[18] Five days

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[18]The relevant part of the transcript of the recorded second telephone call reads as follows:

Q. [Ryan]: . . . I just think it's not normal for like you know, an older man to grab
a kid's hand and put it on his dick.

A. [Renderos]: Oh, forget about that shit, you want to . . . do things like that when
you were younger, you want to do this, you want to experiment different things.

Q. But you remember, you would grab my dick too. I mean—

A. You forget about these things. Just forget about those things and—like I tell you, concentrate on now. Don't—forget about then. Forget about that shit, Man. Concentrate on your girl. . . .****

Q. I just don't get why you would grab me and shit, you know? That just bothers me.

A. Well, just forget about that shit, Man. Forget about the shit. Hey, come on

after the telephone conversations, on April 25, 2001, the People filed a criminal complaint against Renderos, charging him with various felony sex offenses.

Renderos testified on his own behalf and denied molesting Ryan on any occasion. He claimed that he met Lisa somewhere around 1992 or 1993, and he dated her for about three or four years. Renderos could not recall

how old Ryan was when he first met the boy; he claimed Ryan must have been around ten years old. He confirmed Ryan's testimony that after he started dating Lisa, he ate dinner at Lisa's home on an almost nightly basis. However, Renderos claimed that practically every night he was at Lisa's home, after

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over some day and we talk about it and get this in the open. . . .

Q. You're not [g]ay, are you?

A. Fuck, no. . . .[¶]

Q. Yeah?

A. I love pussy, Man. You know me better than that. . . .
Q. But then why'd you grab me, Dude?

A. Forget about things like that. You were grabbing me you know and I was, you know, we were just fuckin' around and just forget about that shit.

Q. All right. All right.

A. Put it in the . . . past, forget about it, don't think about it and then when you want to [b]ullshit, come on over we can talk about it and . . . get it in the open between you and me and then . . . it won't bother you no more.

Ex. D at 5-6.

the boys were asleep, he and Lisa had intimate relations in her bedroom and then he left at about 11:00 p.m.[19] Renderos claimed Lisa did not work "that much" at night. He recalled caring for the boys on only five occasions.

Renderos explained his statements in the recorded telephone calls with Ryan referred to incidents that took place when Ryan was eleven or twelve years old. Specifically, on a few occasions, after having sex with Ryan's mother, Renderos came out of Lisa's bedroom to find Ryan outside the bedroom door. Renderos recalled Ryan saying, "[H]ow do [you] like my mother's . . . female part." Then, Ryan would grab Renderos' penis through his clothes. Renderos told Ryan to stop touching him. The incidents happened on five occasions and then they just stopped. Renderos told Lisa about the incidents, suggesting they have intimate relations later in the evening. During the two telephone calls with Ryan in April 2001, Renderos thought Ryan was referring to the incidents when Ryan had waited for him outside Lisa's bedroom and grabbed his penis as he emerged from the room. Renderos claimed all the statements he made on tape were references to those incidents instigated by Ryan.

Renderos was found guilty of one count of committing continuous sexual abuse (during a four month period when Ryan was eight years old), one count of oral copulation (when Ryan was nine or ten years old), one count of sexual penetration with a foreign object (when Ryan was ten years old), and 23 counts of committing a lewd act on a child under

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[19] Ryan's mother testified she usually had itimate relations with Renderos at his home and not in the presence of the children. She further testified there might have been a time when she was intimate with Renderos in her home after the children went to bed but she could not recall any such occasion. Ex. D at 6.

14 (each count covering a one-month interval from September 1, 1992 through July 31, 1994 when Ryan was eight, nine, and ten years old). The jury also found true factual allegations under section 803(g) making the prosecution timely as to each offense of which they found Renderos guilty. The trial court sentenced Renderos to an aggregate term of 66 years in prison.

Ex. D at 2-7 (footnotes renumbered).

On December 30, 2003, the California Court of Appeal affirmed petitioner's sentence, and on April 14, 2004, the California Supreme Court denied review. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. section 2254 seeking summary reversal of his convictions, arguing the prosecution was barred by the six-year statute of limitations and any extension under section 803(g) was unconstitutional.

DISCUSSION

I. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State

court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court on a set of materially indistinguishable acts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly-established law was "objectively unreasonable." Id. at 409.

The only definitive source of clearly-established federal law under 28 U.S.C. section 2254(d) is in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Id. at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th

Cir. 2003). While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court precedent, only the Supreme Court's holdings are binding on the state courts and only those holdings need be "reasonably" applied. Id.

II. Petitioner's Claims

Renderos claims that: (1) application of California Penal Code section 803(g) extending the statute of limitations for the underlying criminal action was a violation of the Ex Post Facto Clause of the United States Constitution, (2) the burden of proving the timeliness of a prosecution under the statute of limitations requires proof beyond a reasonable doubt, not merely clear and convincing evidence, (3) the trial court violated his right to a fair trial and due process by permitting propensity evidence and not providing appropriate limiting instructions, (4) the trial court's failure to provide standard jury instructions CALJIC 2.01 and CALJIC 2.71 sua sponte violated his right to a fair trial and due process, (5) his right to due process was violated by the prosecution's improper reference to testimony in closing argument; (6) trial counsel was ineffective, and (7) the cumulative effect of all these alleged errors violated his right to due process.

A. Statutory Extension of Statute of Limitations

Petitioner claims that California Penal Code section 803(g) is an unconstitutional ex post facto law as applied to prosecutions based on allegations of post-1987 molestation. That law provides:

> (1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5.
>
> (2) This subdivision applies only if all of the following occur:
>
> > (A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired.

(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.

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(C) There is independent evidence that corroborates the victim's allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim's allegation.

(3) No evidence may be used to corroborate the victim's allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.

Renderos was convicted of criminal conduct falling within section 803(g) committed between May 1, 1992 and September 19, 1994. Charges were brought against Renderos on April 25, 2001, outside of the six-year limitations period imposed by section 800 of the California Penal Code. Therefore, the charges would have been dismissed but for the extension of the limitations period by section 803(g).

The California Court of Appeal found no ex post facto bar to the charges on which petitioner was tried and convicted. See *People v. Renderos*, 114 Cal.App.4th 961 (Cal. Ct. App. 2003). The Court relied centrally on *Stogner v. California*, 539 U.S. 607 (2003), which held section 803(g) unconstitutional under the Ex Post Facto Clause as applied to cases in which the six-year statute of limitations had expired prior to January 1, 1994, the effective date of the statute. See *Renderos*, 114 Cal.App.4th at 965. "The [C]ourt, however, expressly noted its holding did not affect or otherwise 'prevent the State from extending time limits . . . for prosecutions not yet time barred.'" Id. (quoting

Stogner, 539 U.S. at 632). The Court of Appeal found that as applied to Renderos's case, section 803(g) operated as an extension of the unexpired six-year statute of limitations and was therefore not unconstitutional. Id.

The court rejected Renderos's argument that the text of the section 803(g), which states that it applies only if "the limitation period specified in section 800 or 801 has expired," id. (quoting Cal. Penal Code § 803(g)), transforms it into a revival statute. Renderos claimed that this requirement means that the six-year statute of limitations expired on his offenses and was revived when the victim filed a report. See id. The Court disagreed:

> Subdivision (g) of section 803, provides: "Notwithstanding any limitation" in section 800 or 801, the People may pursue a prosecution of certain sexual offenses involving minors within one year from the time a victim files a report. The proviso that the subsection does not apply unless the statute of limitations has expired in section 800 or 801 "obviously ensures that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 or 801 where the victim reports the crime to a qualifying law enforcement agency before the three-year or six-year period set forth in the latter provisions 'has expired.' In this way, the limitations period in section 803(g)--like other 'tolling' and 'extension' provisions in the same statute--serves to prolong, rather than shorten, the time in which a felony child molestation prosecution may be commenced." . . . . Thus, for those offenses committed before January 1, 1994, but where the statute of limitations in sections 800 or 801 had not yet expired as of that date, section 803(g) can be read as "extending" the statute of limitations so that a prosecution is timely if it is commenced no more than one year

> after a victim reports the abuse to an appropriate law enforcement agency. That the People could not prosecute the action until a report was filed by Ryan, does not support Renderos's contention the statute as applied to him had the effect of "reviving" a prosecution barred by the statute of limitations. Because the statute of limitations under section 800 had not expired when section 803(g) became effective on January 1, 1994, section 803(g) permitted the People to commence prosecution for the offenses within one year after the filing of Ryan's report of abuse, notwithstanding the limitation period in section 800.

Id. at 965-66 (emphasis in original, footnotes and citations omitted). This Court agrees with the construction given to the statute by the California Court of Appeal.

That the Court of Appeal's holding is correct is further supported by a closer analysis of *Stogner*. There, the Supreme Court held that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution." 539 U.S. at 632-33. The Court found section 803(g) to be an ex post facto law as applied to pre-1988 molestations because the limitations period had expired prior to enactment of the statute.[20] The Court gave two reasons for its holding. First, the Court found that the statute threatened the kind of harm that the Ex Post Facto Clause seeks to avoid because it had a "manifestly unjust and oppressive retroactive effect[]." Id. at 611 (internal quotations omitted). "[E]xtending a limitations period after

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[20] The distinction between 1987 and 1988 is significant. When section 803(g) first became effective on January 1, 1994, the existing statute of limitations for child molestation was six years. The existing six-year limitation period expired for pre-1988 claims before section 803(g) was enacted, but not for post-1987 claims.

the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest." Id. (citation and internal quotations omitted). Doing so deprives the defendant of fair warning that may have led the defendant to preserve exculpatory evidence. Id.

As a second reason, the Court found that the law fit within one of the classic definitions of an ex post facto law because it "aggravates a crime, or makes it greater than it was when committed." Id. at 613 (quoting *Calder v. Bull,* 3 U.S. 386, 390 (1798)). The Court elaborated that the statute is such a law as applied to pre-1988 conduct because it "inflict[s] punishments, where the party was not, by law, liable to any punishment." Id. (quoting Calder, 3 U.S. at 389) (emphasis in original). This type of law was contrasted with laws that bring about a "[r]etroactive extension of unexpired statutes of limitations." Id. at 630-31. Those laws do not offend the Ex Post Facto Clause in light of "history, case law, and constitutional purposes." Id.; see also *United States v. Bischel*, 61 F.3d 1429, 1435-36 (9th Cir. 1995).

The distinction drawn by the Supreme Court makes clear that the California Court of Appeal reasonably interpreted section 803(g) as an "extension" statute as applied against post-1987 offenses, and not as an unconstitutional "revival" statute. It read the proviso that the subsection does not apply unless the statute of limitations "has expired"[21] as "ensur[ing] that the one-year period in section 803(g)(1) does not override or otherwise conflict with sections 800 or 801 where the victim reports the crime to a qualifying law enforcement agency before the three-year or six-year period set forth in the latter provisions 'has expired.'" 114 Cal.App.4th at 966-67.

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[21] California Penal Code section 803(g)(1)(A).

In focusing on the term "expired" petitioner has placed too much emphasis on the formal language of the statute and too little on its practical effect. In practice, for conduct occurring after 1987, the statute of limitations never expires because the transition from the six-year limitations period to subdivision (g)'s flexible limitation period is seamless. The defendant never becomes "safe from [the law's] pursuit," and has not been deprived

of "fair warning" that he should preserve exculpatory evidence. *See Stogner*, 539 U.S. at 611. Nor does the statute, as applied here, inflict a punishment where the defendant previously was not liable for one. See id. at 613. Contrary to petitioner's insistence, the statute does not authorize a previously-barred criminal prosecution; the prosecution is never barred until one year has expired after a victim reports the crime. Prior to that moment, there is not one microsecond in which the defendant is ever safe from prosecution under the statutory scheme. The "expiration" requirement of section 803(g) was introduced for the specific purpose of ensuring that no defendant can escape prosecution because of the interplay between sections 800, 801 and 803(g). See *Renderos*, 114 Cal.App.4th at 966. It would be a strange thing indeed to give the statute an interpretation which would have the opposite effect.

Under the Court of Appeal's view, there are two separate statutes of limitation for the crime committed in this case, each of which applies co-equally. The first, section 800, imposes a six-year statute of limitations and accrues at the commission of the offense. See Cal. Penal Code § 800. The second, section 803(g), imposes a one-year statute of limitations and accrues when: (1) the statute of limitations under section 800 expires and (2) the victim reports the crime to a California law enforcement agency. See Cal. Penal Code § 803(g). Even when section 800's six-year period expires, the statute of limitations under

section 803(g) has not yet expired because it has not yet accrued. This is therefore not a case in which "the State has, in effect, granted an amnesty" and "retroactively withdraw[n] a complete defense to prosecution after it has already attached." *Stogner*, 539 U.S. at 632.

In finding that section 803(g) extends the limitations period before it expires as applied to post-1987 offenses, the state appellate court ruling was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent as defined by Stogner. Although petitioner disputes the California Court of Appeal's reading of section 803(g), this Court must show deference to that court's interpretation of state law. *See New Hampshire Ins. Co. v. Vieira*, 930 F.3d 696, 701 (9th Cir. 1991) (Federal courts are

bound to state court interpretations of state law unless they are convinced that the highest court of the state would decide otherwise.); see also *Murtishaw v. Woodford*, 255 F.3d 926, 964-65 (9th Cir. 2001) (In applying federal ex post facto prohibition to state law, a federal court accepts the meaning ascribed to the state law by the state's highest court.). The California Court of Appeal's interpretation of section 803(g) is entirely reasonable and a fair indication of how the California Supreme Court would view the statute.

Therefore, the state court's characterization of section 803(g) stands and petitioner's ex post facto challenge fails.

B. Sufficiency of Evidence for Supporting Timeliness of Prosecution

Petitioner claims that the statute of limitations is an element of the offense and any evidence supporting timeliness of prosecution under

section 803(g) must be proven beyond a reasonable doubt.

The California Court of Appeal held that petitioner's right to due process was not violated by the trial court's instruction that the burden of proof on the factual allegations under section 803(g) was by clear and convincing evidence, and not the higher burden of proof beyond a reasonable doubt. Ex. D at 16-18. The court ruled that, although the statute of limitations is an "element" of the offense under California law, the state's Supreme Court has consistently held that the element need only be proven by a preponderance of the evidence. Id. at 17. The court also pointed out that no United States Supreme Court case has ever extended to statutes of limitations the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 476, 490 (2000) that any fact other than a prior conviction that increases the maximum punishment must be proven beyond a reasonable doubt. See id. In response to petitioner's reliance on *Grunewald v. United States*, 353 U.S. 391, 396 (1957), the court found that the case "does not expressly state the statute of limitations applicable for the crime of conspiracy needs to be proved beyond a reasonable

doubt."[22] Id. *Grunewald* and its progeny[23] are also distinguishable

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[22] *Grunewald* states only that "[i]t was . . . incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed after that date." 353 U.S. at 396. In addition, the Court quotes the trial court, which had instructed the jury that the timing of the overt act element must have been found beyond a reasonable doubt. See id. at 412. However, the Court did not discuss the appropriateness of this component of the trial court's instruction.

[23] See United States v. Andreen, 628 F.2d 1236, 1248 (9th Cir. 1980); United States v. Brown, 936 F.2d 1042, 1049 (9th Cir. 1991); United States v. Fuchs,

because they treat the statute of limitations as coinciding with the overt act element of a charge of conspiracy, which clearly must be proven beyond a reasonable doubt. Id. In contrast, accrual under section 803(g) does not coincide with any element of the underlying offense. Id. Therefore, the Court of Appeal found no basis in federal law for finding that the trial court's jury instruction was error. The Court of Appeal's reasoning is persuasive and should not be disturbed. Petitioner fails to cite any Supreme Court case that has expressly indicated that the beyond-a-reasonable-doubt standard applies to the statute of limitations for a criminal offense. Indeed, petitioner admits that "[f]ederal law concerning whether a criminal statute of limitations is an element of the offense that must be proven beyond a reasonable doubt has been somewhat less clear" than California courts' pronouncements on the subject. Petitioner's Memorandum at 9. Therefore, at best, the state of the law on this subject is ambiguous and there is no "[c]learly established federal law, as determined by the Supreme Court" which supports habeas relief. 28 U.S.C. § 2254(d)(1); see also *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme Court] is, at best, ambiguous."). Petitioner also suggests that Stogner, by holding that the Ex Post Facto Clause bars revival of an expired statute of limitations, somehow converted the statute of limitations into an "element" of the offense, thereby requiring proof beyond a reasonable doubt. He

relies on the Court's statement that the statute of limitations determines whether or not the defendant is liable for punishment, 539 U.S. at 613, to argue that it must therefore be an element of the offense. However, there is nothing remarkable about the fact that the statue of limitations

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218 F.3d 957, 967 (9th Cir. 2000) (Graber, J., dissenting).

is one of many factors that may be determinative of a defendant's liability. The Supreme Court's recognition of this common-sense fact did not trigger any watershed change in the law. Had the Supreme Court desired to use a decision regarding the Ex Post Facto Clause as a vehicle to effect a sea change in the due process requirements for charging and proving almost all criminal cases in the country, it surely would have expressed its intentions with far greater clarity. Thus, the California Court of Appeal's determination that the Due Process Clause does not require the statute of limitations under section 803(g) to be proven beyond a reasonable doubt was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. See 28 U.S.C. § 2254(d).

C. Admission of Propensity Evidence and Absence of Limiting Instructions

Petitioner claims that his right to due process was violated by his trial court's admission of a portion of the tape of his telephone calls with Ryan seeking to procure an underage female prostitute. He also argues that the trial court erred by admitting, without a limiting instruction, other telephone conversation excerpts in which he and Ryan discussed some of the charged acts. According to petitioner, these statements were the only corroboration[24] evidence of other charged acts that were not discussed. He contends that admission of each of these types of "propensity" evidence rendered his trial unfair.

1.Conversations Regarding Petitioner's Interest in a Prostitute

The California Court of Appeal held that petitioner had waived this claim by failing to object on this constitutional basis at trial. Ex. D at 23. Alternatively, the state

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[24] Section 803(g)(2)(C) requires there to be "independent evidence that corroborates the victim's allegations."

appellate court also rejected the claim on the merits, finding that admission of the evidence was harmless error because "[t]he prejudicial effect of the evidence was minimal given that it 'was no stronger and no more inflammatory than the [evidence] concerning the charged offenses.'" Id. (quoting *People v. Ewoldt*, 7 Cal.4th 380, 405 (Cal. 1994)).

a. Procedural Default

The Ninth Circuit has repeatedly held that California's contemporaneous objection rule, which requires objection at the time of trial to preserve an issue for appeal, is an adequate procedural bar to federal habeas review (including where the petitioner raised only an evidentiary, not a constitutional objection, at trial). See, e.g., *Davis v. Woodford*, 384 F.3d 628, 653-54 (9th Cir. 2004); *Vansickel v. White*, 166 F.3d 953, 957-58 (9th Cir. 1999); *Hines v. Enomoto*, 658 F.2d 667, 673 (9th Cir. 1981).[25]

The California Court of Appeal's invocation of the contemporaneous objection rule here accordingly precludes federal review of petitioner's claim unless petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner fails to make such a showing here. His Fourteenth Amendment claim is therefore barred from federal habeas

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[25] The Ninth Circuit's decision in Melendez v. Plieler, 288 F.3d 1120 (9th Cir. 2002), is not to the contrary. In Melendez, the court simply recognized that "there are no California cases holding that the [contemporaneous objection] rule is applied consistently in situations in which an objection is made but the trial court in its discretion declines to consider it on the merits." 288 F.3d at 1125 (emphasis in original). That was not the situation here.

corpus review. See *Davis*, 384 F.3d at 653-54.

b. Denial on the Merits

Even if petitioner's claim were not procedurally barred, it would still fail because petitioner has not met the high burden for showing that the admission of the prior acts evidence violated his due process rights. Such relief is not granted unless the admission

of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); see also *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). The challenged evidence was admitted "to describe the relationship between the alleged victim and the defendant," Ex. D at 23, which was relevant to the plaintiff's credibility. It was not arbitrary for the trial court to admit it on those grounds, and the Court of Appeal was not unreasonable to find the admission harmless error.

2. Conversations Regarding Other Charged Acts

The Court of Appeal ruled that evidence of similar sexual misconduct may be introduced to corroborate, for section 803(g) purposes, a victim's account of other, charged, misconduct. See Ex. D at 13. According to the court, "[t]he jury could reasonably find all the sexual offenses were so significantly similar in nature to each other and occurred in such close temporal proximity to each other that Renderos's telephone statements . . . clearly and convincingly corroborated Ryan's testimony regarding all the acts of abuse." Id.

Petitioner cites no federal precedent which supports the principle that the admission of propensity evidence to support a charge of child molestation violates due process. Indeed, it is common among

jurisdictions in the United States to allow such evidence to be admitted for precisely that purpose. See, e.g. Federal Rule of Evidence 414 (allowing evidence of similar crimes in child molestation cases). Recognizing this fact, the Ninth Circuit has held that "there is nothing fundamentally unfair about the allowance of propensity evidence" against a defendant prosecuted for child molestation. *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001). Petitioner's claim therefore fails.

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D. Trial Court's Incomplete Instruction Under CALJIC No. 2.71

Petitioner claims that his right to a fair trial and due process was violated by the trial court's failure to read the cautionary third sentence of CALJIC No. 2.71 sua sponte relating to jury consideration of out-of-court oral statements by petitioner. The California Court of Appeal characterized the error as follows:

> Without objection, the trial court instructed the jury on its consideration of Renderos's statements using only the first two sentences in CALJIC No. 2.71, as follows: "An admission is a statement made by [a][the] defendant which does not by itself acknowledge [his][her] guilt of the crime[s] for which the defendant is on trial, but which statements tends to prove [his][her] guilt when considered with the result of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part." The court did not use the third sentence of CALJIC No. 2.71, which would have instructed the jury that "[e]vidence of an oral admission of [a][the] defendant not made in court should be viewed with caution" (cautionary instruction).

> Renderos now argues the trial court committed prejudicial error by failing to give the cautionary instruction sua sponte. He concedes the trial court was not required to instruct the jury to view with caution his telephone statements, which were recorded by the police. However, he contends the cautionary instruction was required regarding Ryan's testimony as to the following statements: (1) (during the Russian River incident) Renderos told Ryan to leave his (Ryan's) hand on Renderos's penis; (2) (during a discussion between Ryan and Renderos prompted by Ryan asking Renderos if he had ever been in jail) Renderos stated, "there are consequences for everything"; and (3) (months after the Russian River incident) Renderos told Ryan not to talk about their sexual encounters; Renderos said he (Renderos) would get in trouble, and Ryan should not discuss the matter with his mother.

Ex. D at 27-28 (footnotes and citations omitted).

The state appellate court held that under state law, even though the cautionary instruction should have been read to the jury, the error was harmless and reversal was not warranted. Id. at 28. This Court agrees.

The applicable standard is whether the defective instruction "so infected the entire trial that the resulting conviction violates due process." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (internal quotation marks and citations omitted). Moreover, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the

context of the overall charge." Id. "If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the

Constitution." Id.; see also *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) ("Federal habeas courts . . . do not grant relief . . . simply because the instruction may have been deficient in comparison to the CALJIC model.").

A habeas petitioner is not entitled to relief unless the instructional error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In other words, state prisoners seeking federal habeas relief may obtain plenary review of constitutional claims of trial error, but are not entitled to habeas relief unless the error resulted in "actual prejudice." Id. (citation omitted); see, e.g., *Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir. 2000) (finding *Brecht* error where "at the very least" the court could not "'say with fair assurance . . . that the judgment was not substantially swayed by the [instructional] error.'") (citation omitted).

Here, the California Court of Appeal reasonably determined that actual prejudice had not occurred. It noted that the jury was fully instructed "'on judging the credibility of a witness, thus providing guidance on how to determine whether to credit [Ryan's] testimony'"; the statements were not "'a substantial part of evidence offered to establish the prosecution's case'" and "were not vitally important evidence"; and "[g]iven the nature of Renderos's telephone statements, which were not subject to the cautionary instruction, we cannot say the verdict would have been different had the jury been told to view with caution [petitioner's] other extrajudicial statements." Ex. D at 29. For the same reason, petitioner's claim for habeas relief fails.

E. Trial Court's Improper Instruction on CALJIC No. 2.01

Petitioner claims that his due process right was violated by the trial

court's additional comments to CALJIC No. 2.01, which he claims interjected a one-sided example of circumstantial evidence that favoring the prosecution.

The California Court of Appeal rejected petitioner's argument:

> Without objection, the trial court instructed the jury on the meaning of circumstantial and direct evidence, and the meaning of "inference," as follows: "Evidence is either direct or circumstantial. [¶] Direct evidence is evidence that directly proves a fact. It is evidence which by itself if found to be true establishes the fact. [¶] Circumstantial evidence is evidence that if found to be true proves a fact from which an inference of the existence of another fact may be drawn. [¶] An 'inference' is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [¶] Direct evidence often times is considered eye witness evidence. Somebody that has seen an act and describes it in court. [¶] Circumstantial evidence, I'll give you an example. Let's assume this is a case where a person is accused of breaking into a jew elry store. And the facts are that somebody broke the glass in the jewelry store in front of the store, grabbed some jewelry and ran. No one saw those acts, but a person is caught within a block or two of the store, and in the cuffs of the pants of the individual, they find broken glass that matches the glass that was broken from the front of the store. Also that he's in possession of jewelry that is identified from being taken from that store. The fact there is glass in the cuffs of the individual, and the fact that he was in possession of jewelry is circumstantial evidence tending to prove guilt. That's kind of an example of what direct and circumstantial evidence is. [¶] It is not necessary the facts be proved by direct evidence. They may be proved alsoby circumstantial evidence or a combination of direct and circumstantial evidence. Both direct and

circumstantial evidence are acceptable as means of proof. Neither is entitled to any greater weight than the other."

Renderos now challenges the italicized language of trial court's instruction, arguing that "this one-sided example suggested to the jury that circumstantial evidence is always highly probative of guilt, giving a false significance to such evidence." He further argues that although the prosecution's evidence in support of the charges is primarily Ryan's direct testimony he had been sexually abused, the "corroborating" evidence required under section 803(g) was almost entirely circumstantial, consisting of Renderos's telephone statements. Accordingly, Renderos argues even if the court had not given the challenged example, the court should have instructed sua sponte using the language in CALJIC No. 2.01, which, in pertinent part, informs the jury circumstantial evidence is no more probative than any other evidence and should be evaluated carefully. Renderos concludes by arguing: "Having given the argumentative example, it was incumbent upon the trial court to correct any false impression the jury might have gotten by giving CALJIC No. 2.01."

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Initially, we note Renderos waived his right to appellate review of the jury instructions on the issue of circumstantial evidence by failing to object to the instruction or requesting clarification of the instruction at the trial level. In any event, he has failed to show how the instruction affected his fundamental rights. The correctness of jury instructions is determined from the entire instructions given by the court and not from isolated parts of instructions. The example of circumstantial evidence did not suggest to the jury that "circumstantial evidence is always highly probative of guilt," as argued by Renderos. Consequently, the trial court was not required to correct any misimpression by

instructing the jury using the language in CALJIC No. 2.01. The trial court was not otherwise under any duty to instruct the jury using the language in CALJIC No. 2.01 on its own initiative.

Ex. D at 25-26 (citations omitted) (emphasis in original).

There is no reason to disturb the Court of Appeal's holding. Petitioner's claim is barred by procedurally default because of his failure to object at trial. See supra Part C.1; *Davis v. Woodford*, 384 F.3d 628, 653-54 (9th Cir. 2004); *Vansickel v. White*, 166 F.3d 953, 957-58 (9th Cir. 1999). Alternatively, his claim also fails on the merits. The state appellate court reasonably determined that the instruction, in light of the instructions as a whole, could not have misled the jury. The court's robbery example did not suggest to the jury that circumstantial evidence is always highly probative of guilt. In fact, the trial court expressly stated that "[n]either [direct nor circumstantial evidence] is entitled to any greater weight than the other." Ex. D at 26.

Petitioner has failed to show that the instructional error rendered the trial so fundamentally unfair that he was denied due process. See *Estelle v. McGuire*, 502 U.S. at 72-73. As such, the California Court of Appeal reasonably concluded that there was no reasonable likelihood the jury applied the challenged instruction in a way that violates the Constitution. See *Middleton v. McNeil*, 124 S.Ct. at 1832. Therefore, petitioner's claim fails.

F. Prosecution's Improper Reference to Related Testimony by Victim's Mother During Closing Argument

Petitioner claims that the prosecutor committed prejudicial misconduct by allowing Ryan's mother to testify on cross-examination that both her sons had been molested and by referring to the testimony during

closing argument.

The California Court of Appeal held that there was no merit to Renderos's contentions:

> Renderos argued on appeal his conviction should be reversed because the trial prosecutor failed to prevent Ryan's mother, Lisa, from testifying on cross-examination both her sons had been molested,[26] and the prosecutor did not avow Lisa's testimony (which had been stricken), but instead referred to it during her closing statement to the jury, when she argued: "I

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[26] The transcript of Lisa's testimony during cross-examination, in context, with the challenged portion italicized, reads as follows:
"Q. . . . [W]hat kind of relationship did you have with your son, Ryan?
"A. What kind of relationship did I have with my son, Ryan?
"Q. During the time period '92 to '96?
"A. Ryan had some signs of dysfunction. There was no doubt. He had some anger issues. I took Ryan to psychologists. I took him to psychiatrists. Um, from the period of six grade to the present he's been in about eight different schools. I have met with special education. . . . I didn't know what the problem was with Ryan . . . . [¶] He's never been in trouble outside of our home. Everything has always been centered from our home. He would get angry, punch a door, hit the wall, things like this. I didn't know why.
"Q. You are saying this all occurred approximately around 1992?
"A. No, it started a little later . . . . [¶] It started later.
"Q. It's fair to say this type of behavior was never present in Ryan before?
"A. No.
"Q. 1992?
"A. No, both of my boys, and I say both of my boys have had problems, both my boys have been molested.
[Defense Counsel]: Objection, move to strike, your Honor.
The Court: Sustained.
[Defense Counsel]: Nonresponsive.
The Court: The jury will disregard the last sentence, please.[Lisa]: Don't shake your head like that. Don't do it.
The Court: Ms. C[], there is no question before you, please."
The transcript does not indicate to whom Lisa is directing her remark regarding the shaking of a head. It appears likely, however, that it was directed towards Renderos.

think what you saw from [Lisa] was some really righteous emotion on the witness stand. She was upset . . . . [¶] What she said, you know, was emotional. I don't think you can read that to say she was somehow making these things

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up to help the case along . . . . [¶] When we are talking about, you know, credibility, you can look at the witness's demeanor while they are testifying. You can look at Lisa . . . , what she did, what she said, her emotions." There is no merit to Renderos's contentions regarding the prosecutor's conduct.

The record does not contain any evidence the prosecutor knew or should have known Lisa was going to mention both her sons had been molested. Moreover, the trial court directed the jury to disregard the testimony, and we assume the jury followed that instruction. Further, Renderos did not object or request any cautionary instruction regarding either Lisa's conduct or the prosecutor's references to the emotional nature of Lisa's conduct on the witness stand. In any event, to the extent any of the challenged comments were erroneous or inappropriate, it is not reasonably probable a different result would have been reached in the absence of those remarks.

Ex. D at 24-25 (footnote renumbered and citations omitted).

Prosecutorial misconduct may serve as a basis for federal habeas relief. The appropriate standard of review is the narrow one of due process and not the broad exercise of supervisory power. See *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." See id.; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged

prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Claims of prosecutorial misconduct are reviewed "on the merits, examining the entire proceedings to determine whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Johnson v Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (citation omitted).

The first factor in determining the prejudicial effects of misconduct is whether the trial court issued a curative instruction. When a curative instruction is issued, a court presumes that the jury has disregarded inadmissible evidence and that no due process violation occurred. See *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Darden*, 477 U.S. at 182 (the Court condemned egregious, inflammatory comments by the prosecutor but held that the trial was fair since curative actions were taken by the trial judge). This

presumption may be overcome if there is an "overwhelming probability" that the jury would be unable to disregard evidence and a strong likelihood that the effect of the misconduct would be "devastating" to the defendant. See *Greer*, 483 U.S. at 766 n.8.

Here, immediately after Ryan's mother testified that both boys had been molested, the state trial court ordered the jury to disregard the testimony. It was not unreasonable for the Court of Appeal to assume that the jury followed the instruction. Petitioner has made no showing that there was an "overwhelming probability" the jury would have been unable to disregard the stricken evidence. Moreover, petitioner has presented nothing to support an inference that the prosecutor was on notice that Ryan's mother would make the statement. See Ex. D at 25. To the extent any of the challenged remarks in closing argument were erroneous or inappropriate, it is "not reasonably probable a different

result would have been reached in the absence of those remarks." Ex. D at 25. Put simply, the California Court of Appeal reasonably determined that there was neither misconduct nor actual prejudice from the mother's testimony or the prosecutor's closing argument.

G. Ineffective Assistance of Counsel

Petitioner claims that his Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated by counsel's failure to: (1) challenge the prosecution's amendment to add section 803(g) claims to the information; (2) object to the admission of propensity evidence and request a limiting instruction; (3) object to prosecution's closing argument regarding the mother's other crimes accusation; and (4) cross-examine on financial interest. Petitioner also requests an evidentiary hearing on these claims.

1. Legal Standard

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must demonstrate that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. The relevant inquiry is not what

defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. See *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. See *Strickland*, 466 U.S. at 689. It is unnecessary for a federal court considering a habeas ineffective assistance claim to address the prejudice prong of the Strickland test if the petitioner cannot even establish incompetence under the first prong. See *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998). Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The *Strickland* framework for analyzing ineffective assistance of counsel claims is considered to be "clearly established Federal law, as determined by the Supreme Court of the United States" for the purposes of 28 U.S.C. section 2254(d) analysis. See *Williams (Terry) v. Taylor*, 529 U.S. 362, 404-09 (2000).

2. Failure to Challenge Addition of 803(g) Claims to Information

The California Court of Appeal found no legal basis under state law for petitioner to succeed on a motion to dismiss the amended charges under section 803(g). As a result,

counsel's failure to make the motion did not establish prejudice and cannot support a claim of ineffective assistance:

> [E]ven if Rendon's trial counsel had objected to the

information or any amendment to the information on the basis the prosecutor could not add factual allegations under section 803(g), such a challenge would have been futile. Under section 1009, the trial court was authorized to grant the prosecutor's request to amend the information by including those allegations. (*Chadd, supra*, 28 Cal.3d at p. 758.) Renderos has not shown the addition of the factual allegations under section 803(g) prejudiced his substantial rights. (See § 960 ["[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits"].) At all times, Renderos was aware of the time periods during which the offenses happened, and he testified at length without alleging he was unable to mount a proper defense. Even if the trial court erred in allowing the amendment, when the statute of limitations issue is tried to a jury, any deficiency in the pleading in that regard no longer matters. (*People v. Williams* (1999) 21 Cal.4th 335, 346 [if the record shows the action is not time-barred, "the conviction will stand despite the prosecution's error in filing an information that appeared time-barred"].)

Ex. D at 34.

Petitioner contends that the state appellate court's reliance on People v. Chadd, 28 Cal.3d 739 (1981) was incorrect because the case itself was based on an "obsolete" holding that the statute of limitations was not an element of the offense. Petitioner's Memorandum at 11. Petitioner claims that because the parties waived preliminary examination, state law prohibited new charges in the amended information, including charges that become "new" when new elements are added.

For the reasons discussed earlier, the state court's interpretation that

the statute of limitations is not an "element" of the offense is not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. See supra Part B. Moreover, it was reasonable for the Court of Appeal to find that no prejudice could have ensued from counsel's failure to challenge the amended information. Therefore, petitioner's claim fails.

25

3.Admission of Propensity Evidence and Absence of Limiting Instruction

As discussed earlier, the California Court of Appeal reasonably held that the admission of the propensity evidence was harmless beyond a reasonable doubt. Ex. D at 23. Therefore, there was no prejudice under Strickland, and his claim fails.

4. Failure to Object to Prosecution's Closing Argument

Petitioner claims that counsel's failure to object to the prosecution's closing argument regarding testimony by Ryan's mother, Lisa, who testified on cross-examination that both her sons had been molested, violated his right to effective assistance of counsel. See supra Part F (discussing prosecution's closing argument and relevant portions of Lisa's testimony).

The California Court of Appeal reasonably found the comments to be harmless "to the extent any of the challenged comments were erroneous or inappropriate[.]" Ex. D at 25. As such, petitioner fails to satisfy the prejudice prong of the *Strickland* test. Moreover, counsel's decision not to object is often a question of professional judgment that should not be second-guessed. See *Garcia v. Bunnell*, 33 F.3d 1193, 1199-1200 (9th Cir. 1994) ("[M]any trial lawyers refrain from objecting during closing arguments to all but the most egregious misstatements

by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality"). Therefore, petitioner's claim fails.

5.Failure to Cross-Examine on Financial Interest

Petitioner also claims that counsel was ineffective for failing to cross-examine Ryan and his mother, Lisa, on the grounds that "(1) Renderos had lent money to Lisa, which she did not want to repay to him" and "(2) Ryan planned to file a civil action for monetary damages if Renderos was convicted." Ex. D at 35. Renderos claims that his trial counsel was aware of these issues, but simply forgot to bring them up during cross-examination.

The California Court of Appeal rejected this argument:

> We accept, for the purpose of argument, that defense counsel had no "tactical reason" for not questioning Ryan and Lisa regarding any financial motives for their testimony, and counsel meant to question the witnesses but he merely forgot. Nevertheless, in determining whether counsel's failure was prejudicial, we evaluate the entire record, not the single error in isolation. Defense counsel did impeach both Ryan and Lisa, noting their recollections of the events in question were contradictory, there was a lack of corroborative physical evidence, and Ryan's trial testimony was contradicted by his earlier statements to the police. To the extent defense counsel could or should have questioned the witnesses about their financial motives for pursuing charges against Renderos, defense counsel's failure to so question the witnesses does not "undermine [our] confidence in the outcome." (*People v. Riel* (2000) 22 Cal.4th 1153, 1175.) The testimony of the witnesses

would have helped only if the witnesses admitted Lisa owed a debt to Renderos that she did not want to repay, and at the time of trial, Ryan was planning to file a civil lawsuit for monetary damages. However, Lisa was not a percipient witness to any of the acts of sexual molestation and her testimony was not critical to Renderos's convictions. Although Ryan's credibility was central to the case, there was independent evidence that corroborated his allegations, namely, Renderos's telephone statements. Thus, it is highly unlikely a jury would draw such a negative inference from the filing of a civil lawsuit for damages or a dispute over money owed to Renderos that it would have acquitted him. We cannot say the verdict was "rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance." *(Strickland v. Washington, supra*, 466 U.S. at p. 702.).

Ex. D at 36.

The state appellate court reasonably concluded that petitioner failed to establish prejudice under the *Strickland* test. See *Strickland*, 466 U.S. at 694. Petitioner fails to demonstrate a reasonable probability that, but for counsel's failure to cross-examine on financial interest, the result of the proceeding would have been different. Therefore, petitioner's claim for habeas relief fails.

6. Request for an Evidentiary Hearing

Because petitioner's ineffective assistance of counsel claims can be resolved by reference to the state court record, the Court denies his request for an evidentiary hearing. See *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998).

H. Cumulative Error

Finally, petitioner urges the Court to consider whether the alleged various errors rendered his trial cumulatively unfair, thus requiring reversal of his conviction. It is true that, although individual errors may not rise to the level of a constitutional violation, a collection of errors might violate a defendant's constitutional rights. *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995). However, here petitioner has not demonstrated constitutional error that would have had a substantial and prejudicial effect on the jury's verdict.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is DENIED. It is further ordered that petitioner's request for evidentiary hearing is DENIED.

IT IS SO ORDERED.
Dated: July 7, 2005

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

Court of Appeal, First Appellate District, Division Three - Nos.
A097873/A103588
S122464

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APR 16 2004
ROBERT J. BELES
ATTORNEY AT LAW

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

FILE

v.

VICTOR MANUEL RENDEROS, Defendant and Appellant.

In re VICTOR MANUEL RENDEROS ON HABEAS CORPUS.

Petition for review DENIED.

SUPREME COURT
FILED
APR 14 2004
Frederick K. Ohlrich Clerk
Deputy

GEORGE, C.J.
Chief Justice

BEST AVAILABLE COPY

(iii) Any Order on Rehearing, Including the Caption Showing the Name of the Issuing Court, the Title and Number of the Case, and the Date of Entry;

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 19 2007

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

VICTOR MANUEL RENDEROS, Petitioner - Appellant, V. STUART RYAN, Warden, Respondent - Appellee.	No. 05-16454 D.C. No. CV-04-05250-CRB Northern District of California, San Francisco ORDER

Before: SILER,* RAWLINSON, and BYBEE, Circuit Judges.

The panel judges have voted to deny appellant's petition for rehearing. Judge Rawlinson and Judge Bybee have voted to deny the petition for rehearing en banc, and Judge Siler has recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed November 27, 2006, is hereby DENIED.

* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.